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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

Petitioner,

Esther Wunnicke

v.

~~ROBERT LERESCHE~~, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.*,
Respondents,

KENAI LUMBER CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a State, without the express consent of Congress, prohibit private parties from exporting into interstate and foreign commerce unprocessed logs obtained from State-owned land, when both the stated purpose and the effect of the prohibition are to favor local manufacturing interests?

2. Can Congressional consent to an otherwise unconstitutional State restraint on interstate and foreign commerce be implied from federal statutes or administrative rules solely regulating activities on federally-owned lands?

PARTIES INVOLVED

Petitioner, South-Central Timber Development, Inc., has two subsidiaries, South Central Export Sales Co. and Western Alaska Logging Co., Inc., and no affiliates. When this suit was filed, petitioner was a wholly-owned subsidiary of Iwakura-Gumi Lumber Co., Ltd., a Japanese corporation. On or about February 17, 1983, Far North Supply Corporation, a Washington corporation, purchased all the shares of South-Central Timber Development, Inc., and now operates South-Central as a wholly-owned subsidiary. Far North Supply Corporation has no other affiliates or subsidiaries.

Respondents, Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska, Geoffrey Haynes, Director of the Division of Lands of the Department of Natural Resources, and Theodore G. Smith, Director of Forest, Land and Water Management, of the Department of Natural Resources, were appellants below and defendants in the district court. Respondent, Kenai Lumber Company, Inc., a subsidiary of Louisiana Pacific Corporation, was an appellant below and an intervenor-defendant in the district court.

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KENAI LUMBER CO., INC.,
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**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

The petitioner, South-Central Timber Development, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 1, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 693 F.2d 890, and is set forth in Appendix A, *infra*, pp. 1a-7a. The memorandum and order of the United States District Court for the District of Alaska is reported at 511 F. Supp. 139, and appears in Appendix B, *infra*, pp. 8a-16a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1982. On February 17, 1983, Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including March 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

This case involves the following constitutional provision, statute, and regulations: the Commerce Clause of U.S. Const. art. I, § 8, cl. 3; Alaska Stat. § 38.05.115; Alaska Admin. Code tit. 11, § 76.130 (1974) (repealed 1982); Alaska Admin. Code tit. 11, § 71.230 (1982); and Alaska Admin. Code tit. 11, § 71.910(11) (1982). These provisions are set forth in Appendix D, *infra*, at 19a-21a.

STATEMENT

This case involves an attempt by the Commissioner of the Department of Natural Resources of the State of Alaska to require that certain timber cut from state-owned lands be processed in-state prior to being exported into foreign or interstate commerce. The court of appeals concluded that this state restraint did not violate the Commerce Clause because the court found "*implicit approval* of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from *federal lands*." (693 F.2d at 891; App. A at 2a) (emphasis added). This decision raises two important Commerce Clause issues. *First*, whether a court can redefine federal/state power to regulate interstate and foreign commerce when it finds that Congress has given implicit, rather than express, consent to state action that would otherwise violate the Commerce Clause. *Second*,

whether a state can condition the sale of state-owned natural resources on the purchaser's promise to process the natural resources in-state, when both the purpose and the effect of the state restraint are to protect local manufacturing interests.

Petitioner, South-Central Timber Development, Inc., an Alaska corporation, is engaged in the business of purchasing Alaska standing timber,¹ logging such timber, and shipping the resulting logs into foreign commerce.² In 1980, the Petitioner filed a Complaint For Injunctive Relief in the United States District Court for the District of Alaska, alleging that Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska, and others, were preparing to hold a state timber

¹ "Timber" means trees in their natural condition and location, live or dead from natural causes; "logs" means portions of trees cut into lengths, with limbs removed, transported off the land where they grew and ready for manufacture into lumber, plywood, paper or other usable products; "cants" are portions of logs which have been cut lengthwise and thus are flat on at least one side, but which will have to be cut lengthwise again to produce lumber suitable for end use.

² Exports account for 93% of the sales of wood products produced from Alaska timber, and virtually all such exports are destined for Japan. See Kerr & Wibbenmeyer, *Alaskan Export Policy* 26, 33 (1979). Due to shipping costs, there is neither an interstate market for Alaska wood products nor any market at all for "squares" or "cants" manufactured to Alaska specifications. Thus, the principal burden of Alaska's primary manufacture requirement falls on export trade with Japan. Japan is also the major international purchaser of unprocessed logs from other states located in the Ninth Circuit. In fact, in 1980, Japan purchased 90% of the \$1.4 billion of unprocessed logs exported from Washington, Oregon, Alaska, and California. F. Ruderman, *Production, Prices, Employment and Trade in Northwest Forest Industries, Second Quarter 1982* at 19 (U.S. Forest Service 1982).

sale, and that the public notice and state contract contained certain provisions and regulations which were repugnant to the Commerce Clause of the United States Constitution. (U.S. Const. art. I, § 8, cl. 3.)

Specifically, the contract imposed a "primary manufacture" requirement, *i.e.*, the timber would have to be processed in-state prior to export. The Commissioner's action was taken pursuant to state regulations in effect at that time. *See* Alaska Admin. Code tit. 11, § 76.130 (1974) (repealed 1982). (App. D at 20a-21a.)³ The stated purpose of the requirement was to protect in-state manufacturers. In particular, the State legislature passed resolutions requesting that the Commissioner of the Department of Natural Resources exercise his statutory authority to impose the primary manufacture requirement in order "to provide local employment as well as building materials for the Alaska market." (Excerpt of Record in the Court of Appeals at 73.) In addition, "[t]he Commissioner stated the requirement was necessary to insure 'a continuing supply of timber for existing industry' during temporary shortages of timber from federal lands. Final Finding for Icy Bay/Cape Yakatuga Sale at 2 (Excerpt of Record (E.R.) 121, 122)." (693 F.2d at 892; App. A at 3a-4a.)

Petitioner was operating in the same area under an earlier state timber sale which did not require local pro-

³ While the original primary manufacture regulation has been repealed, it has been replaced by two other provisions which, in effect, reenacted the policy of the State or arguably even strengthened that policy. *See* Alaska Admin. Code tit. 11, § 71.230 (1982) and Alaska Admin. Code tit. 11, § 71.910(11) (1982). (App. D. at 19a-20a.) Recently, the State of Alaska advertised six timber sales in the south central district of Alaska which were to be held on March 1, 1983. All six sales were to require primary manufacture within Alaska.

cessing, and exporting most of the logs to Japan. Petitioner does not have a working mill in Alaska, and, therefore, would have been unable to meet the local processing requirement. Thus, because of the additional costs of having the primary manufacture performed in-state,⁴ petitioner was effectively precluded from bidding on the timber. (511 F. Supp. at 141; App. B at 10a.)

1. District Court Decision

On January 5, 1981, the United States District Court for the District of Alaska issued a Memorandum and Order granting the Petitioner's Motion for Summary Judgment and a Permanent Injunction. (511 F. Supp. at 139; App. B at 8a.) The Court found it had jurisdiction pursuant to 28 U.S.C. § 1331(a), the amount in controversy exceeded \$10,000, and the State regulations violated the U.S. Const. art. I, § 8, cl. 3. (511 F. Supp. at 140; App. B at 9a.) The Judgment granting a Permanent Injunction prohibiting the Defendants from requiring primary manufacture under the State regulations was entered by the District Court on January 6, 1981. (App. C at 17a-18a.)

The district court rejected the State's argument that the primary manufacture requirement was permissible under the Commerce Clause because the requirement was consistent with federal policy. After examining federal statutes and regulations restricting the export of

⁴ The timber at issue is in a remote location, and the only available site to process it is a mill owned by Kenai Lumber Company, the intervenor in this case. Kenai Lumber Company was a competing bidder on the particular tract of timber involved in this case. (693 F.2d at 892; App. A at 4a.)

unprocessed logs from *federal* lands, the court concluded that

Congress has not consented to any primary manufacture requirements imposed *by the states*. . .

* * *

Although Congress has authorized the Secretary of Agriculture to make necessary rules to regulate the national forests, and has imposed export quotas on unprocessed timber from *federal* lands, *it has in no way expressly exempted state timber laws from commerce clause restrictions.*

(511 F. Supp. at 141-42; App. B at 12a) (emphasis added).

The district court also rejected the State's argument that the challenged action was exempt from Commerce Clause scrutiny because the State was acting in a proprietary capacity. The court, rejecting the State's reliance on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), considered the uniqueness of the natural resource involved, the fortuity of its location, and the national need for the unrestricted flow of timber and concluded that Alaska could not discriminate in favor of local businesses "simply because a resource lies on state-owned land." (511 F. Supp. at 143; App. B at 14a.) The court concluded: "While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not 'attach conditions to the use or disposition of the resource that might independently burden interstate commerce. . . .'" (511 F. Supp. at 143; App. B at 14a) (quoting Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, And State Control Of Natural Resources*, 1979 Sup. Ct.Rev. 51, 79 (1980)).

On the merits of the Commerce Clause issue, the court held that the primary manufacture requirement was unconstitutional. The court found that the in-state processing requirement constituted simple economic protectionism, that the requirement placed a substantial burden on interstate commerce, and that the State had less burdensome means available to achieve the same end. (511 F. Supp. at 143-44; App. B at 15a-16a.)

2. Court Of Appeals Decision

On appeal, the Ninth Circuit reversed. (693 F.2d at 890-93; App. A at 1a-7a.) The court of appeals noted that the Commerce Clause, by its own power, invalidates state statutes that discriminate against or unduly burden interstate commerce, and that in the absence of congressional authorization, "state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case." (693 F.2d at 892; App. A at 4a.) The court of appeals also recognized that this Court has carved out narrow exceptions to this general rule, e.g., when a state acts as a "market participant," and not as a "market regulator," the Commerce Clause does not apply. The court of appeals concluded, however, that it did not have to consider whether the "market participant" exception applied, since this was not a case where "the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy." (693 F.2d at 892; App. A at 5a.)

The Ninth Circuit recognized that "usually" regulation of interstate or foreign commerce by a state that would otherwise violate the Commerce Clause requires that Congress *expressly* authorize the state regulation. (693 F.2d at 893; App. A at 5a.) The Ninth Circuit, however,

found, *without citing any authority*, that such direct and express approval of Congress is not always required and that "[t]here will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." (693 F.2d at 893; App. A at 5a.)

The Ninth Circuit then found that "there is *implicit approval* of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands." (693 F.2d at 891; App. A at 2a) (emphasis added). In particular, the court of appeals found that the federal policy with respect to timber cut from federal lands "evinced a general federal policy of promoting geographic dispersion in the timber industry" (693 F.2d at 893; App. A at 5a), and that the Alaska State policy served the same objective as the federal policy, *i.e.*, "that of promoting industrial developments in isolated areas." (693 F.2d at 893; App. A at 6a.) Because, according to the court, "[t]he state's decision could not have been more in keeping with federal timber policy," it concluded that there was "ample congressional acquiescence in Alaska's primary manufacture requirement." (693 F.2d at 893; App. A at 6a.)

REASONS FOR GRANTING THE WRIT

The decision below sanctions a state restraint on interstate and foreign commerce that was intended solely to protect local manufacturing interests. The court of appeals reached this result by concluding that Congress had given its "implicit approval" to the state practice. This "implicit approval" theory is unprecedented; it is inconsistent with both prior decisions of this Court and the theory underlying the Congressional consent doctrine. Moreover, this "implicit approval" theory will en-

courage other resource-rich states to imitate Alaska by enacting discriminatory legislation of their own. Finally, this "implicit approval" theory introduces an unnecessarily complex and indeterminate inquiry into Commerce Clause litigation. Review by this Court is needed to clarify the scope of the Congressional consent doctrine, to avoid the enactment of similar state discriminatory legislation, and to prevent state protectionist measures from interfering with foreign commerce.

I. The Ninth Circuit's "Implicit Approval" Theory Is In Conflict With Prior Decisions Of This Court Requiring Express Congressional Consent To State Action That Would Otherwise Violate The Commerce Clause.

It is well-established that "Congress has undoubted power to redefine the distribution of power over interstate commerce . . ." by consenting to state action that would otherwise violate the Commerce Clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). When this Court has

found such consent, [however,] Congress' " 'intent and policy,' to sustain state legislation from attack under the Commerce Clause" was " 'expressly stated.' " *New England Power Co. v. New Hampshire*, . . . (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 . . . (1946)).

Sporhase v. Nebraska ex rel. Douglas, 102 S. Ct. 3456, 3466 (1982) (footnote omitted); see *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

The decision below holding that Congressional consent can be implied is in direct conflict with an unbroken line of decisions of this Court. Just four weeks ago, this Court stated: "Where state or local government action is *specifically authorized by Congress*, it is not subject to the Commerce Clause even if it interferes with interstate

commerce." *White v. Massachusetts Council of Construction Employers, Inc.*, 51 U.S.L.W. 4211, 4213 (U.S. Feb. 28, 1983) (emphasis added). In *White*, this Court rejected a Commerce Clause attack on a local restraint on commerce because this Court found that "the federal regulations . . . affirmatively permit the type of parochial favoritism" involved. *Id.* at 4213-14 (emphasis added) (footnote omitted). "But when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946), [this Court has] no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) (citation omitted); see *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949).

There are important reasons for requiring that Congressional consent be stated expressly. Commerce Clause issues involve the allocation of power between the federal government and the states. This Court's Commerce Clause precedents ensure that a delicate accommodation between federal and state interests is maintained. Although the Constitution recognizes that the states retain a significant degree of autonomy, the Commerce Clause ensures that state "tendencies toward economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979), do not threaten national unity. Any departure from these settled principles, i.e., any redefinition of this allocation of power, is a serious matter. This Court's precedents have, therefore, consistently required that Congress expressly reveal its intent to redefine the federal/state relationship, and have firmly established that such redefinition will not be presumed in the

absence of explicit Congressional authorization. It is this longstanding and important principle that the Ninth Circuit has seriously undermined.

Underlying this principle is the basic concern that those harmed by a governmental act be represented in the political body making the decision. This Court has been particularly hostile to economic protectionism, in part, because the parties adversely affected, viz., out-of-staters, are not represented in the political body enacting the discriminatory legislation. See *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177, 184 n.2 (1938); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940); see also Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125, 128 n.14. It is permissible for Congress to consent to such discriminatory legislation because those adversely affected are represented in the political body deciding that the discriminatory legislation is in the national interest. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). "[T]he dangers of a part discriminating against the whole are greater than the whole discriminating against a part, for an inner political check that is not operative in the former is operative in the latter case." J. Nowak, R. Rotunda and J. Young, *Constitutional Law* 245 (1978). Only when Congressional consent is explicit can we have any confidence that those adversely affected have had an opportunity to participate in the governmental decision that has done them harm.⁵

⁵ This concern may be even more important where the discrimination is against foreign countries or nationals since their only political recourse is through the diplomatic process, and foreign diplomats are accredited only to the federal government. See generally *infra* at 16-19.

Moreover, local economic protectionism is a continuing problem. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322 (1979). The Ninth Circuit's open-ended "implied authorization" test will only invite more discriminatory legislation. The states have attempted to use the "implied consent" argument in the recent past, without success. *See, e.g., Sporhase v. Nebraska ex rel. Douglas*, 102 S. Ct. 3456 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980). The Ninth Circuit's innovation will only encourage more attempts at local protectionism. The Oregon experience (discussed *infra* at 15) is only a beginning.

In addition, an implied consent doctrine would be extremely difficult to apply. As stated by the Ninth Circuit—without citation of authority and with virtually no explanation of the underlying rationale—the doctrine introduces an unnecessarily complex and uncertain inquiry into Commerce Clause litigation.

In short, the Ninth Circuit's adoption of an "implicit approval" theory raises an important Commerce Clause issue which should be considered by this Court. The "theory" is inconsistent with prior decisions of this Court; it is flatly inconsistent with the theory underlying Congressional consent; it will encourage other resource-rich states to enact similar discriminatory measures; and it will unnecessarily complicate Commerce Clause litigation.

II. Requiring In-State Processing Of Natural Resources Is Contrary To Commerce Clause Precedents And Is Of Great Practical Importance.

This Court has long recognized that the battle over the control and exploitation of the nation's natural resources threatens fundamental Commerce Clause concerns, *see,*

e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), and the recent histories of both the United States and Canada have aptly illustrated that recognizing the power of local political units to reserve natural resources found within their borders for the benefits of their inhabitants carries a serious potential for the division of the nation along local or regional lines.⁶

Furthermore, in Commerce Clause cases, this

Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1; *Johnson v. Haydel*, 278 U.S. 16; *Toomer v. Witsell*, 334 U.S. 385.

Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970). Because such restraints "impose an artificial rigidity on the economic pattern of the industry . . ." *Toomer v. Witsell*, 334 U.S. 385, 404 (1948)—a rigidity drawn along state lines—they threaten the animating purpose of the Commerce Clause, *i.e.*, to fuse a collection of independent, sovereign states into one nation. In short, the result of the decision below is to sanction the type of economic protectionism that goes to the heart of basic Commerce Clause concerns.⁷

⁶ See, *e.g.*, *The Second War between the States*, Business Week 92-114 (May 17, 1976); *Balkanizing Canada: The Cost of Provincial Barriers*, Business Week 52 (Sept. 15, 1980).

⁷ As the district court concluded, Alaska's ownership of the timber does not justify imposing an in-state processing requirement. (511 F. Supp. at 142-43; App. B at 13a-14a.) It specifically rejected Alaska's

In addition, the decision below has great practical impact on the timber industry in the western States. The timber industry already faces statutes restricting the export of unprocessed logs in four western states and the threat of legislation in others. Currently, both Idaho and Alaska impose primary manufacture requirements on both interstate and foreign exports; Oregon and California impose primary manufacture requirements on foreign exports only. Idaho Code § 58-403 (1905) (Amended, 1921, 1935, and 1974); Alaska Admin. Code tit. 11, §§ 76.130 (1974) (repealed 1982), 71.230 (1982) and 71.910 (1982); Or. Rev. Stat. § 526.805; Cal. Pub. Res. Code § 4650.1 (West Supp. 1982). (App. D at 19a-21a; App. E at 36a-38a.) See also Lindel, *Log Export Restrictions of the*

argument that it was only acting as a "market participant," and not as a "market regulator," see *White v. Massachusetts Council of Construction Employers, Inc.*, 51 U.S.L.W. 4211 (U.S. Feb. 28, 1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The court of appeals stated that "[w]e need not reach the question, however." (693 F.2d at 892; App. A at 5a.)

Although this Court has not identified precise limits to the "market participant" doctrine, the state action involved here is clearly outside the exemption from Commerce Clause scrutiny provided by that doctrine. See, e.g., Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 79; Anson & Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 92 (1980); Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 Geo. Wash. L. Rev. 601, 620 (1982). This case involves a state attempt to attach conditions to the use or disposition of state-owned natural resources beyond the state's initial sale. In fact, in *Reeves*, this Court specifically noted that South Dakota had not "cut off access to its cement altogether, for the policy [of preferring South Dakota customers] does not bar resale of South Dakota cement to out-of-state purchasers." 447 U.S. at 444 n.17 (emphasis added).

Western States and British Columbia 7 (U.S. Dept. of Agriculture 1978). As a result of the decision below, such protectionist measures may well be considered immune from Commerce Clause attack as the experience in Oregon clearly shows.

The Oregon statute and regulation have been questioned on Commerce Clause grounds by the Oregon Attorney General since 1961. (App. F at 39a-50a.) Since the decision below, the Oregon export ban has been effectively reinstated. A staff report published on January 6, 1983 by the Joint Legislative Committee on Trade and Economic Development of the Oregon legislature has, however, expressed concern and confusion over the Ninth Circuit's decision. The report pointed out that the doctrine of "implicit congressional approval" has never been enunciated by this Court, and suggested that a court could have as easily found that Congress has repeatedly decided *not* to restrict the export of logs from timber on non-federally owned lands as it could the "implicit" extension of the ban of exports from federal lands. *Final Draft, The Log Export Issue: An Analysis* (Jan. 6, 1983). (App. I at 62a-83a.) In short, the Ninth Circuit's decision further confuses state regulation of the vast timber resources found within the Ninth Circuit states. See U.S. Department of Commerce, *Statistical Abstract of the United States*, §§ 25, 26, 27, and Tables 1257, 1279, and 1308 (102d ed. 1981). (App. H at 52a-61a.)⁸

⁸ The western states within the Ninth Circuit's jurisdiction account for more than 57 percent of the total saw timber net volume for the entire United States and more than 71 percent of the softwood saw timber net volume for the entire United States. Thus any state regulation of the interstate or international commerce involving the timber they produce is of substantial national and international importance. As the *Statistical Abstract* also shows, the western states

Moreover, the impact of the decision below is not limited to the timber industry. If the Ninth Circuit opinion is allowed to stand without review, then the case may cause considerable confusion as to the permissibility of requiring in-state processing of any natural resource. The Federal Government has enacted many policies regarding oil, minerals, and other natural resources on federal land, *see generally, e.g.,* Pring, "*Power to Spare*": *Conditioning Federal Resource Leases to Protect Social, Economic, and Environmental Values*, 14 Nat. Resources Law. 305 (1981), and resource-rich states have already imposed restrictions on exporting other natural resources, including crude oil and natural gas in Louisiana and Texas. *See generally* Anson and Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 93-95 (1980). The decision below will only encourage states to enact similar discriminatory legislation with respect to other natural resources under the theory that local protectionism is somehow consistent with federal policy with respect to natural resources.

III. The State Restriction Here Directly Burdens Foreign Commerce And Thus Interferes With A Sensitive Federal Function.

The primary impact of Alaska's restraint falls on international commerce, since most of the timber harvested in Alaska is exported—principally to Japan.⁹ Petitioner has been frustrated by the State of Alaska in its attempt to

which are within the Ninth Circuit's jurisdiction are also the repositories of other significant natural resources (including fish and minerals) which will, in all likelihood, become more important and significant as time progresses.

⁹ See n.2, *supra*.

purchase unprocessed logs for export to Japan. Thus, without the express consent of Congress, a state restraint designed solely to protect local manufacturing interests has directly interfered with foreign commerce.¹⁰

This Court has long recognized that Congress has "exclusive and absolute" power over foreign commerce, *see Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904), and that Commerce Clause scrutiny may be even more rigorous when a state restraint on foreign commerce is asserted than when only interstate commerce is involved. *See Bowman v. Chicago & Northwestern Railway Co.*, 125 U.S. 465, 482 (1888). Indeed, it was only a short time ago that this Court strongly emphasized the enduring vitality of these principles in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979) (footnotes omitted) (citation omitted):

Foreign commerce is preeminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933). Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce "with foreign Nations" and "among the several States" in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction. . . . Finally, in discussing the Import-Export Clause, this Court, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal

¹⁰ As noted above, Oregon and California have primary manufacture requirements which are limited to international exports.

Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

In short, "[i]f state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce." L. Tribe, *American Constitutional Law* § 6-20, at 380 (1978).

Congress has explicitly recognized that export restrictions have potentially serious implications for international relations; that "the ability of United States citizens to engage in international commerce is a fundamental concern of United States policy," and that "[u]ncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States." Export Administration Act of 1979, 50 U.S.C. app. § 2401 (1), (2) and (6) (Supp. III 1979). Thus "[i]t is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations. . . ." Export Administration Act of 1979, 50 U.S.C. app. § 2402(1) (Supp. III 1979). (App. E at 24a.)

Congressionally-imposed export restrictions are therefore generally limited to situations where export controls are deemed necessary to serve national security purposes (50 U.S.C. app. § 2404), to further foreign policy objectives (50 U.S.C. app. § 2405), or to retain for domestic use commodities determined to be in short supply. (50 U.S.C. app. § 2406). Congress has accordingly been very specific in stating when it wants export controls to be imposed. One example of this is found in the controls imposed on

Alaska North Slope crude oil, which cannot be exported to foreign countries subject to some very limited exceptions. *See* Trans-Alaska Pipeline Authorization Act, 30 U.S.C. § 185(u) (1976); Export Administration Act of 1979, 50 U.S.C. app. § 2406(d) (Supp. III 1979). Another even more pertinent example is the export control imposed on unprocessed western red cedar logs from state and federal lands. Export Administration Act of 1979, 50 U.S.C. app. § 2406(i) (Supp. III 1979). (App. E at 28a-29a.) If Congress had intended to allow similar controls to be imposed on other types of unprocessed logs from state lands, it would have explicitly said so—which it has not.

In short, what the State of Alaska has sought to do here is to take over the sensitive Congressional function of balancing national and international interests, and to decide for itself to burden foreign commerce. This is impermissible. Congress knows how to regulate international exports and its regulation should be exclusive. Thus, the "implied consent" theory relied on by the court below is especially erroneous where restrictions on foreign commerce are at issue.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue. Indeed, so clear is the

error of the decision below that we believe summary reversal would be appropriate.

Respectfully submitted,

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March, 1983

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-3053X
81-3081X

D.C. No.
A80-311 Civ.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appellee,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska; *et al.,*
Defendants-Appellants,

KENAI LUMBER COMPANY, INC.,
Intervenor Defendant.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appellee,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska; *et al.,*
Defendants,

KENAI LUMBER COMPANY, INC.,
Intervenor
Defendant-Appellants.

FILED

December 1, 1982

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

OPINION

Appeal From The United States District Court
For The District Of AlaskaHonorable James A. von der Heydt, Chief Judge,
United States District Judge, Presiding

Argued and Submitted: December 10, 1981

Before: GOODWIN, KENNEDY, and SKOPIL, Circuit Judges.

KENNEDY, Circuit Judge:

The State of Alaska, by statute, authorizes the imposition of certain conditions on the sale of state-owned timber, conditions pointedly designed to favor its local timber processors. In an action brought by a prospective timber buyer challenging the constitutionality of the state's restrictions, the district court held the Alaska statute violates the commerce clause of the United States Constitution. We conclude there is implicit approval of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands. We reverse the district court's finding of invalidity.

The Commissioner of the Department of Natural Resources of Alaska is by law given discretion to condition particular sales of timber on primary manufacture in Alaska.¹ In 1980 the Commissioner gave notice of a proposed sale of state-owned timber at Icy Cape and announced that Alaska would require

¹ The Commissioner of the Department of Natural Resources of Alaska, upon recommendation of the Director of the Division of Lands of the Department of Natural Resources, "shall determine the timber and other materials to be sold, and the limitations, conditions and terms of sale." Alaska Stat. § 38.05.115.

The Alaska regulations provide that:

- (a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

primary manufacture within the state as a special provision of the contract.² The Commissioner stated the requirement was necessary to insure "a continuing supply of timber for existing

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

11 A.A.C. 76.130. The primary manufacture requirement is defined further by the Governor's Policy Statement of Primary Manufacture of May 7, 1974.

² The notice of public sale set out the primary manufacture contract term as follows:

Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974. For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in waste.

Chips are considered to have received primary manufacture.

industry" during temporary shortages of timber from federal lands. Final Finding for Icy Bay/Cape Yakatuga Sale at 2 (Excerpt of Record (E.R.) 121, 122).

Appellee South-Central Timber Development, Inc. is an Alaska corporation engaged in purchasing timber and processing it for sale. It does not own an operating mill in Alaska, and its practice had been to process Alaskan timber outside the state. When it learned of the new requirement, South-Central brought this action for injunctive relief against various state officials. The company claimed it was prevented from bidding on the Icy Cape sale by the added expense of in-state processing. The district court granted a temporary restraining order, and when it expired the applicants agreed to postpone the sale until a final decision on the merits.

Kenai Lumber Company, Inc. intended to bid at the Icy Cape sale to obtain timber for its sawmill in Alaska. The district court allowed Kenai to intervene in the suit as a defendant. Upon cross-motions for summary judgment, the district court granted summary judgment for plaintiff-appellee, and concluded that the primary manufacture requirement put an impermissible burden on interstate commerce.

It long has been settled that states may regulate in some areas of commerce, absent congressional action to displace such laws, *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. 298 (12 How.) (1851); but state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). The rule has been invoked to invalidate state statutes which promote local processing industries by forbidding shipment of raw resources, *Foster-Fountain Packing v. Haydel*, 278 U.S. 1 (1928). The commerce clause by its own power invalidates such discriminatory statutes.

Despite the force of this rule, there are narrow exceptions, as in the case of a state proprietary activity, *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). Alaska contends its statute is saved

by that exception here. We need not reach the question, however. This is not a case where the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy.

While there may be some outer limits to its power, it is generally accepted that Congress is free to approve and thereby validate commercial regulations otherwise beyond a state's authority. Congress can "confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44.

The rule acknowledging congressional power to approve otherwise impermissible state regulation of interstate commerce usually is applied in cases where Congress has expressly authorized such regulation, *see, e.g., Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981). But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests.

The federal government has consistently endorsed restrictions on the interstate shipment of timber to protect the local processing capability of isolated areas, evincing a general federal policy of promoting geographic dispersion in the timber industry. Since 1928 the Forest Service has limited the export of unprocessed logs from National Forests in Alaska under general authority granted by the Organic Administration Act of June 4, 1897 (16 U.S.C. § 475, 551). In 1969 Congress set a quota on the unprocessed timber that could be exported from federal lands west of the 100th meridian (a line running south from the mid-point of the North Dakota-Canadian boundary, through central Texas). Lindell, *Log Export Restrictions of the Western States and British Columbia*, 7 (U.S. Dept. of Agri-

culture 1978) (E.R. 130). In 1973 Congress strengthened its policy by a complete ban on the export of unprocessed timber from such lands.³

When Alaska was admitted to statehood in 1959 and received title to a large portion of the territory's public lands, it continued to adhere, with limited exceptions, to preexisting federal policy.⁴ Lindell, *Log Export Restrictions of the Western States and British Columbia*, 7 (U.S. Dept. of Agriculture 1978) (E.R. 135). The state's primary manufacture requirements duplicate those imposed on federal timber and serve the same objective, that of promoting industrial developments in isolated areas. The decision of Alaska's Commissioner of Natural Resources to condition the sale at Icy Cape on primary manufacture was made in the wake of a temporary suspension of federal timber sales from the Togass and Chugach National Forests. Final Findings on Icy Bay/Cape Yakatuga Sale at 2 (E.R. 122). Its purpose was to protect local processors from

³ The Forest Service regulations are found at 36 C.F.R. § 223.10(b) (1981). The Bureau of Land Management provisions are set forth at 43 C.F.R. §§ 5400.0-3(c), -5 (1981).

⁴ The regulations for Alaska state:

Unprocessed timber from National Forest System Lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. *This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities.* In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (1) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire, or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

36 C.F.R. § 223.10(c) (1981) (emphasis added).

the resulting slack in demand for their services. The state's decision could not have been more in keeping with federal timber policy. In these circumstances, we find ample congressional acquiescence in Alaska's primary manufacture requirement. The judgment of the district court is REVERSED.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A80-311 Civil

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of Natural Resources of the State of Alaska; GEOFFREY HAYNES, Director, Division of Natural Resources, and Deputy Commissioner of Department of Natural Resources of the State of Alaska; and THEODORE G. SMITH, Director of Division of Forest, Land and Water Management, of Department of Natural Resources of the State of Alaska,

Defendants,

KENAI LUMBER COMPANY,

Intervenor.

FILED

January 5, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

By _____ Deputy

MEMORANDUM AND ORDER

VON DER HEYDT, Chief Judge.

THIS CAUSE comes before the court on cross motions by plaintiff and defendant for summary judgment, and defendant-intervenor's motion to dismiss. The parties agree that the sole issue to be decided is whether the State's requirement of primary manufacture violates the Commerce Clause of the

United States Constitution.¹ As the matter in controversy exceeds the sum of \$10,000, this court has jurisdiction pursuant to 28 U.S.C. § 1331(a).

I. FACTS

In September, 1980, the State of Alaska gave notice that it would sell approximately 49,185,000 board feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of the sale provided, pursuant to 11 A.A.C. § 76.130,² that "primary

¹ U.S. Const., art. I § 8 provides in relevant part: "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several states"

² 11 A.A.C. § 76.130 (1974) provides:

PRIMARY MANUFACTURE

- (a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.
- (b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means
 - (1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or
 - (2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).
- (c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

Authority: AS 38.05.020
 AS 38.05.110
 AS 38.05.115
 AS 38.05.120

manufacture within the State of Alaska will be required as a special provision of the contract." The inclusion of the primary manufacture requirement in the timber sales contract requires a successful bidder to pre-cut the sale timber in Alaska prior to export.

Plaintiff South-Central Timber Development, Inc. (South-Central) is an Alaskan corporation engaged in the business of purchasing Alaska standing timber, logging such timber, and shipping the resulting logs into foreign commerce. Although South-Central desires to bid on the Icy Cape No. 2 timber sale, it is hampered by its lack of a working mill in Alaska. South-Central must take into account the added costs of having primary manufacture performed in-state. This added cost effectively precludes South-Central from bidding on the timber.

II. THE COMMERCE CLAUSE AND PRIMARY MANUFACTURE

The State and intervenor contend that the primary manufacture requirement is permissible under the commerce clause for two reasons: 1) Alaska's policy of requiring primary manufacture as a term of a state timber contract is consistent with federal policy as expressed by Congress; and, 2) by including primary manufacture as a term in the state timber contract, the state is not regulating interstate commerce; rather it is acting in a proprietary capacity as a market participant and is therefore exempt from commerce clause requirements.

A. Federal Policy Of Primary Manufacture

It is clear that if Congress had consented to the State's primary manufacture requirement, any commerce clause restrictions would be waived. *E.g. Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). To determine whether Congress has consented to the requirement, the court must examine the relevant Congressional provisions in this area.

The State points out that the federal government historically has placed restrictions on the export of unprocessed logs from federal lands in the western states, including federal lands in Alaska. Since 1928, the United States Forest Service has restricted the export of unprocessed timber from national forest timber sales in Alaska under the general authority granted by Congress. 16 U.S.C. § 471 *et seq.* (1976) (National Forests).

Section 475 provides in part that one of the purposes for establishing a national forest is "to furnish a continuous supply of timber for use and necessities of the citizens of the United States" Section 551 allows the Secretary of Agriculture, under the provisions of § 471, to make necessary "rules and regulations and establish such service . . . to regulate . . . and to preserve the forests" Regulations currently in effect restrict the export, in unprocessed form, of timber harvested from sales in national forest land in Alaska. 36 C.F.R. § 223.10(i).³

³ 36 C.F.R. § 223.10(i)(1977) provides:

Subject to the other provisions of this section, timber cut from the National Forests in the State of Alaska may not be exported from Alaska in the form of logs, cordwood, bolts, or other similar products necessitating primary manufacture elsewhere without prior consent of the Regional Forester. This requirement is determined to be necessary in order to assure the development and continued existence of adequate wood processing capacity in that State essential to the sustained utilization of timber from the National Forests located therein which is geographically isolated from other processing capacity. In determining whether consent will be given to the export of such timber, consideration will be given, among other things, to whether such export will (1) permit a more complete utilization of material on areas being logged primarily for products for local manufacture, (2) prevent loss or serious deterioration of logs unsalable locally because of an unforeseen loss of market, (3) permit the salvage of timber, damaged by wind, insects, or fire, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

An examination of the relevant statutory provisions shows that Congress has not consented to any primary manufacture requirements imposed by the states. When Congress has exempted state laws from commerce clause restrictions, it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. See the Wilson Act, 27 U.S.C. § 121(1976); see also the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1976) ("silence . . . of Congress shall not be construed to impose any barrier to . . . regulation . . . by the several states.").

Although Congress has authorized the Secretary of Agriculture to make necessary rules to regulate the national forests, and has imposed export quotas on unprocessed timber from federal lands, it has in no way expressly exempted state timber laws from commerce clause restrictions. Given Congress' silence, a negative is presumed to bar state action inimical to the national commerce, and in such cases the Supreme Court is "the final arbiter of the competing demands of state and national interests." *South Pacific Co. v. Arizona*, 325 U.S. at 769.

B. The State As A Proprietor

The State maintains that it is acting in a proprietary capacity (as the timber subject to the primary manufacture requirement is state owned) and is therefore unrestricted by the commerce clause. *Reeves v. Stake*, 447 U.S. 429, 100 S. Ct. 2271 (1980); *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976). The Supreme Court has made clear, however, that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). The court must determine whether *Alexandria Scrap* and *Reeves* allow the State to require primary manufacture of state-owned timber within Alaska as a condition of sale.

1. Alexandria Scrap And Reeves

In *Alexandria Scrap*, the Court upheld a Maryland statute which promoted the disposal of abandoned automobiles through cash payments to scrap processors. Even though the payments favored in-state processors, the Court found no commerce clause problems. Relying on the fact that Maryland was acting in a proprietary capacity, the Court held that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." 426 U.S. at 810.

In *Reeves*, the Court ruled that the commerce clause did not prohibit South Dakota from refusing to sell cement from a state owned and operated cement plant to out-of-state customers, pursuant to its policy of supplying South Dakota customers first. The Court noted that "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." 477 U.S. at 436, 100 S. Ct. at 2277.

The *Reeves* Court termed the holding in *Alexandria Scrap* the "general rule" as to states acting in a proprietary manner 477 U.S. at 440, 100 S. Ct. at 2279. The Court went on to concede the possibility of an exception, but reasoned: "in this case [there is] no sufficient reason to depart from the general rule." *Id.* Later, the Court addressed the possible limits to the *Alexandria Scrap* exemption when it considered the argument that if a state were allowed to hoard its resources "Pennsylvania might keep its coal, the northwest its timber, [and] the mining States their minerals." *West v. Kansas Nat. Gas Co.*, 221 U.S. 229, 255 (1911). The Court distinguished cement from natural resources such as coal, timber, wild game, and minerals, and noted that "South Dakota has not sought to limit access to the State's limestone or other materials used to make cement." 447 U.S. at 444, 100 S. Ct. at 2281.

Here the State is restricting the flow of a state-owned natural resource rather than a state-owned man-made commodity.

Timber is not a commodity which, when needed, is capable of being readily produced by any state at any time. Conversely, a state may enter the cement business, with little problem, in order to supply its region with needed cement. The uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow, prevent a state from economically discriminating in favor of its residents simply because a resource lies on state-owned land.

The court finds that the State's primary manufacture requirement goes beyond the *Alexandria Scrap* exemption, as a natural resource is involved. The *Alexandria Scrap* general rule is not a magic talisman which allows a state to place unconstitutional restrictions on a resource if it is state-owned. While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not "attach conditions to the use or disposition of the resource that might independently burden interstate commerce" Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup.Ct.Rev. 51, 71 (1980).

Since the court has determined that the primary manufacture requirement goes beyond the *Alexandria Scrap* exemption, it must determine whether this requirement unconstitutionally burdens commerce.

2. The Pike Test

The Supreme Court has set forth the criteria for determining the validity of state actions affecting interstate commerce. The rule that emerges is that:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the

local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted).

Under this test, the primary manufacture requirement is unconstitutional. The requirement does not regulate evenhandedly, as it does not fall evenly on companies with in-state timber mills and companies with out-of-state timber mills; the requirement precludes South-Central from competing on equal footing with companies that possess in-state mills capable of performing primary manufacture.

Additionally, the public interest served goes beyond the Court's sanction of permissible commerce clause burdens. See e.g. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (state regulation furthering public safety, but burdening commerce held permissible). Here the purpose served is economic—"to protect existing industries, provide for the establishment of new industries, [and] derive revenue from all timber resources" Governor's Office News Release (June 30, 1961) (Governor Egan's policy statement on primary manufacture).

Through the years, the Supreme Court has been alert to the evils of economic protectionism. The Court frequently has indicated that the purpose of the commerce clause was to avoid "the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 332, 325 (1979). "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. at 624.

Turning to the "burden" side of the *Pike* test, the primary manufacture requirement places a substantial rather than an incidental burden on commerce. The application of the primary manufacture requirement would, at the least, require companies without mills in Alaska to lease mill facilities within the

state capable of performing the requirement. Indeed, the "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike*, 397 U.S. at 145.

Finally, the court finds that less burdensome means are available to the State to achieve the same end. For example, the state may implement a statutory scheme which encourages in-state processing rather than action which bars out-of-state processing. This is, however, a legislative question; the court simply notes other schemes are available.

Accordingly, IT IS ORDERED:

- 1) THAT plaintiff's motion for summary judgment is granted.
- 2) THAT defendant's motion for summary judgment is denied and intervenor's motion to dismiss is denied.
- 3) THAT the clerk may prepare a final judgment form stating that the named defendants or any official of the State of Alaska are permanently enjoined from requiring primary manufacture of state-owned timber pursuant to 11 A.A.C. § 76.130, as the requirement of primary manufacture violates art. I, § 8 of the United States Constitution.

DATED at Anchorage, Alaska, this 5th day of January, 1981.

/s/ JAMES A. VON DER HEYDT

United States District Judge

cc: Leroy E. DeVeaux

Mark L. Figura

Shelley Higgins, Assistant Attorney General

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

Civil Action File No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

v.

**ROBERT LERESCHE, Commissioner of the Department of
Natural Resources of the State of Alaska, et al.**

This action came on for (hearing) before the Court, Honorable James A. von der Heydt, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the named defendants or any official of the State of Alaska are permanently enjoined from requiring primary manufacture of state-owned timber pursuant to 11 A.A.C. § 76.130, as the requirement of primary manufacture violates art. I, Section 8 of the United States Constitution.

JUDGMENT

FILED

January 6, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

By _____ Deputy

Costs taxed by Clerk in amount
of \$112.00 on January 21, 1981.

/s/ D. COKER

D. Coker
Deputy Clerk

Dated at Anchorage, Alaska, this 6th day of January, 1981.

APPROVED:

/s/ JAMES A. VON DER HEYDT

James A. von der Heydt
United States District Judge

JOANN MYRES

JoAnn Myres
Clerk of Court

By: /s/ DONNA COKER

Donna Coker
Deputy Clerk

COPY FILED IN O. & J. VOL. 1755

PAGE ____

APPENDIX D**CONSTITUTIONAL PROVISION, STATUTE, AND
REGULATIONS INVOLVED**

Article 1, § 8, Cl. 3 Of The U.S. Const. reads:

The Congress shall have power . . .

* * *

to regulate commerce with foreign nations and among the
several states, and with Indian Tribes;

Alaska Statute

Sec. 38.05.115. Limitations and conditions of sale.

(a) The commissioner, upon recommendation of the director, shall determine the timber and other materials to be sold, the limitations, conditions and terms of sale. The limitations, conditions and terms shall include the utilization, development and maintenance of the sustained yield principle, subject to preference among other beneficial uses. The director may negotiate sales of timber or materials without advertisement and on the limitations, conditions, and terms which he considers are in the best interests of the state, subject to the approval of the commissioner. However, not more than 500 M.B.M. or equivalent other measure of timber or more than \$5,000 of materials may be sold by non-advertised, negotiated sale to the same purchaser within a one-year period.

(b) Negotiated sales for timber or materials not exceeding a value of \$500 are exempt from the provisions of AS 34.15.150 (§ 2 art VI ch 169 SLA 1969; am § 1 ch 66 SLA 1969; am § 9 ch 257 SLA 1976).

Alaska Admin. Code, tit. 11, § 71.230 (1982), provides as follows:

PRIMARY MANUFACTURE OF TIMBER. (a) The director will, in his discretion, require that primary manufacture of timber removed under this chapter be accomplished within the state to the extent consistent with law.

(b) For the purposes of this section, the director will consider timber which has been manufactured into a prod-

uct for use without further processing as having been primarily manufactured only if the director determines that there is a market for the product.

Alaska Admin. Code, tit. 11, § 71.910 (1982), provides in pertinent part as follows:

DEFINITIONS. In this chapter

* * *

(11) 'primary manufacture' means manufacture which is first in order of time or development; the term

(A) when used in relation to a sawmilling operation, means the breakdown process in which logs are reduced in size by a headsaw, gangsaw, or edger to the extent that the residual cants, slabs or planks do not exceed a nominal eight and three-quarters inches in thickness;

(B) when used in relation to a pulp operation, means the breakdown process to the point at which wood fibers have been separated;

(C) when used in relation to an operation for veneer for plywood production, it means the production of green veneer;

(D) when used in relation to poles or piling, whether treated or untreated, means manufacture for the purpose of use as poles or piling; and

(E) when used in relation to timber processing wastes, means manufacture into chips;

* * *

A regulation of the Alaska State Department of Natural Resources of 1974, Alaska Admin. Code, tit. 11, § 76.130 (1974) (Repealed 1982), provides in pertinent part:

PRIMARY MANUFACTURE.

(a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gangsaw to the extent that the residual cants, slabs or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form or product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

APPENDIX E

OTHER RELEVANT STATUTES AND REGULATIONS

I. Federal Statutes and Regulations

The Organic Administration Act of June 4, 1897, 30 Stat. 34, as amended by Act of March 4, 1907, ch. 2907, 34 Stat. 1269, 16 U.S.C. § 475, provides in pertinent part:

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended by Act of October 23, 1962, Pub. L. No. 87-869, § 6, 76 Stat. 1157; Act of August 31, 1964, Pub. L. No. 88-537, 78 Stat. 745; Act of October 21, 1976, Pub. L. No. 94-579, Title VII, § 706(a), 90 Stat. 2793, 16 U.S.C. § 551, provides:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of

not more than \$500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of Title 18.

The Act of March 29, 1944, 58 Stat. 132, 16 U.S.C. § 583, is as follows:

In order to promote the stability of forest industries, of employment, of communities, and of taxable forest wealth, through continuous supplies of timber; in order to provide for a continuous and ample supply of forest products; and in order to secure the benefits of forests in maintenance of water supply, regulation of stream flow, prevention of soil erosion, amelioration of climate, and preservation of wildlife, the Secretary of Agriculture and the Secretary of the Interior are severally authorized to establish by formal declaration, when in their respective judgments such action would be in the public interest, cooperative sustained-yield units which shall consist of federally owned or administered forest land under the jurisdiction of the Secretary establishing the unit and, in addition thereto, land which reasonably may be expected to be made the subject of one or more of the cooperative agreements with private landowners authorized by section 583a of this title.

Section 22 of the Alaska Native Claims Settlement Act of December 18, 1971, as amended; Pub. L. No. 92-203, 85 Stat. 713, as amended on January 2, 1976, Pub. L. No. 94-204, 89 Stat. 1156; as amended on December 2, 1980, Pub. L. No. 96-487, 94 Stat. 2496; 43 U.S.C. § 1621(k), states in pertinent part as follows:

Any patents to lands under this Chapter which are located within the boundaries of a national forest shall contain such conditions as the Secretary deems necessary to assure that:

- (1) The sale of any timber from such sale shall, for a period of five years, be subject to the same restrictions relating to the export of timber from the United States

as are applicable to national forest lands in Alaska under the rules and regulations of the Secretary of Agriculture; and

(2) Such lands are managed under the principle of sustained yield and under management practices for the protection and enhancement of environmental quality no less stringent than such management practices on adjacent national forest lands for a period of twelve years.

Section 2 of the Export Administration Act of September 29, 1979, Pub.L. No. 96-72, 93 Stat. 503, 50 U.S.C. app. § 2401, reads in pertinent part as follows:

Exports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by strengthening the trade balance and the value of the United States dollar, thereby reducing inflation. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries.

Section 3 of the Export Administration Act of September 29, 1979, Pub. L. No. 96-72, 93 Stat. 504, 50 U.S.C. app. § 2402, reads in pertinent part:

The Congress makes the following declarations:

(1) It is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest.

(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—

(A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of coun-

tries which would prove detrimental to the national security of the United States;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and

(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

(3) It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments.

(4) It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives.

(5) It is the policy of the United States—

(A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person;

(B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person; and

(C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

(6) It is the policy of the United States that the desirability of subjecting, or continuing to subject, particular goods or technology or other information to United States export controls should be subjected to review by and

consultation with representatives of appropriate United States Government agencies and private industry.

(7) It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make every reasonable effort to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before resorting to the imposition of controls on exports from the United States. No action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies.

(8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make every reasonable effort to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before resorting to the imposition of export controls.

(9) It is the policy of the United States to cooperate with other countries with which the United States has defense treaty commitments in restricting the export of goods and technology which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States and of those countries with which the United States has defense treaty commitments.

(10) It is the policy of the United States that export trade by United States citizens be given a high priority and not be controlled except when such controls (A) are necessary to further fundamental national security, foreign policy, or short supply objectives, (B) will clearly further such objectives, and (C) are administered consistent with basic standards of due process.

(11) It is the policy of the United States to minimize restrictions on the export of agricultural commodities and products.

Section 7 of the Export Administration Act of September 29, 1979, Pub. L. No. 96-72, 93 Stat. 515, 50 U.S.C. app. § 2406, reads in pertinent part:

Short supply controls

* * *

(g) Agricultural commodities.—(1) The authority conferred by this section shall not be exercised with respect to any agricultural commodity, including fats and oils or animal hides or skins, without the approval of the Secretary of Agriculture. The Secretary of Agriculture shall not approve the exercise of such authority with respect to any such commodity during any period for which the supply of such commodity is determined by the Secretary of Agriculture to be in excess of the requirements of the domestic economy except to the extent the President determines that such exercise of authority is required to carry out the policies set forth in subparagraph (A) or (B) of paragraph (2) of section 3 of this Act [section 2402(2)(A) or (B) of this appendix]. The Secretary of Agriculture shall, by exercising the authorities which the Secretary of Agriculture has under other applicable provisions of law, collect data with respect to export sales of animal hides and skins.

(2) Upon approval of the Secretary, in consultation with the Secretary of Agriculture, agricultural commodities purchased by or for use in a foreign country may remain in the United States for export at a later date free from any quantitative limitations on export which may be imposed to carry out the policy set forth in section 3(2)(C) of this Act [section 2402 (2)(C) of this appendix] subsequent to such approval. The Secretary may not grant such approval unless the Secretary receives adequate assurance and, in conjunction with the Secretary of Agriculture, finds (A) that such commodities will eventually be exported, (B) that neither the sale nor export thereof will result in an excessive drain of scarce materials and have a serious domestic inflationary impact, (C) that storage of such commodities in the United States will not unduly limit the space available for storage of domestically owned

commodities, and (D) that the purpose of such storage is to establish a reserve of such commodities for later use, not including resale to or use by another country. The Secretary may issue such regulations as may be necessary to implement this paragraph.

(3) If the authority conferred by this section or section 6 [section 2405 of this appendix] is exercised to prohibit or curtail the export of any agricultural commodity in order to carry out the policies set forth in subparagraph (B) or (C) of paragraph (2) of section 3 of this Act [section 2402(2)(B) or (C) of this appendix], the President shall immediately report such prohibition or curtailment to the Congress, setting forth the reasons therefor in detail. If the Congress, within 30 days after the date of its receipt of such report, adopts a concurrent resolution disapproving such prohibition or curtailment, then such prohibition or curtailment shall cease to be effective with the adoption of such resolution. In the computation of such 30-day period, there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or because of an adjournment of the Congress sine die.

* * *

(i) Unprocessed red cedar.—(1) The Secretary shall require a validated license, under the authority contained in subsection (a) of this section, for the export of unprocessed western red cedar (*Thuja plicata*) logs, harvested from State or Federal lands. The Secretary shall impose quantitative restrictions upon the export of unprocessed western red cedar logs during the 3-year period beginning on the effective date of this Act as follows:

(A) Not more than thirty million board feet scribner of such logs may be exported during the first year of such 3-year period.

(B) Not more than fifteen million board feet scribner of such logs may be exported during the second year of such period.

(C) Not more than five million board feet scribner of such logs may be exported during the third year of such period.

After the end of such 3-year period, no unprocessed western red cedar logs may be exported from the United States.

(2) The Secretary shall allocate export licenses to exporters pursuant to this subsection on the basis of a prior history of exportation by such exporters and such other factors as the Secretary considers necessary and appropriate to minimize any hardship to the producers of western red cedar and to further the foreign policy of the United States.

(3) Unprocessed western red cedar logs shall not be considered to be an agricultural commodity for purposes of subsection (g) of this section.

(4) As used in this subsection, the term "unprocessed western red cedar" means red cedar timber which has not been processed into—

- (A) lumber without wane;
- (B) chips, pulp, and pulp products;
- (C) veneer and plywood;
- (D) poles, posts, or pilings cut or treated with preservative for use as such and not intended to be further processed; or
- (E) shakes and shingles.

Title III § 301 of an Appropriation Act of November 27, 1979, Pub. L. No. 96-126, 93 Stat. 979, reads in pertinent part as follows:

No part of any appropriation under this Act shall be available to the Secretaries of the Interior and Agriculture for use for any sale hereafter made of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States which will be exported from the United States, or which will be used as a substitute for timber from private lands which is exported by the purchaser: *Provided*, That this limitation shall not apply to specific quantities of grades and species of timber which said Secretaries determine are surplus to domestic lumber and plywood manufacturing needs.

Title III § 308 of an Appropriation Act of November 27, 1979, Pub. L. No. 96-126, 93 Stat. 980, reads in pertinent part as follows:

Notwithstanding the provisions of any other law, the State of Alaska is exempted from application of the provisions of section 7(i) of the Export Administration Act of 1979 (Public Law 96-72).

International Trade Administration, Commerce and Foreign Trade, 15 C.F.R. § 377.7 (1982), reads in pertinent part:

Unprocessed western red cedar.

(a) *General.* The export from the United States to any destination, including Canada, of unprocessed western red cedar as defined below is prohibited except pursuant to a validated export license issued by the Office of Export Administration.

(b) *Definitions.* When used in this section, the following terms have the meanings indicated.

(1) *Unprocessed western red cedar.* Western red cedar (*Thuja plicata*) timber, logs, cants, flitches, and processed lumber containing wane on one or more sides, as listed in Supplement No. 4 to this part, but excluding:

- (i) Lumber without wane;
- (ii) Chips, pulp, and pulp products;
- (iii) Veneer and plywood;
- (iv) Poles, posts, or pilings cut or treated with preservative for use as such and not intended to be further processed; and
- (v) Shakes and shingles.

Commodities excluded above are referred to as 'processed western red cedar'.

(2) *Federal and state lands.* Federal and state lands excluding lands in the State of Alaska and lands held in trust by any federal or state official or agency for a recognized Indian tribe or for any member of such tribe.

(C) *Export quotas.* Annual quotas for the export of unprocessed western red cedar harvested from state and federal lands, produced from commodities so harvested, or which became available for export through substitution for such commodities, are established as follows:

(1) For the fiscal year October 1, 1979—September 30, 1980: 30 MMBF (million board feet scribner);

(2) For the fiscal year October 1, 1980—September 30, 1981: 15 MMBF (million board feet scribner);

(3) For the fiscal year October 1, 1981—September 30, 1982: 5 MMBF (million board feet scribner).

Thereafter the export of unprocessed western red cedar harvested from state and federal lands is prohibited.

Unprocessed western red cedar harvested from private lands, including Indian lands, or in Alaska, or produced from commodities so harvested, is subject to validated licensing but is exempt from the foregoing quota restrictions. Processed western red cedar irrespective of its origin is exempt from both quota restriction and validated licensing.

* * *

(g) *Issuance of export licenses.* . . .

(1) *Unprocessed western red cedar harvested from private lands or in Alaska.* An application for a validated license to export an unprocessed western red cedar commodity listed in Supplement No. 4 to this part which was harvested from lands other than federal or state lands will be considered for approval without quantitative limitation if submitted with supporting documentation as required by paragraphs (h)(1) or (3) below.

(2) *Unprocessed western red cedar harvested from state or federal lands.* An application for a validated license to export an unprocessed western red cedar commodity listed in Supplement No. 4 to this part will be considered, subject to quota limitation, if submitted with supporting documentation as required by paragraphs (h)(2) or (3) below. Each license issued will be charged against the quota allocation of the exporter or

of another person or persons who hold(s) a quota allocation. A quota allocation may only be so charged with the written consent of the quota holder and only if the quota holder now holds or previously held title to, the particular commodities to be exported. Where necessary to cover an entire shipment, portions of that shipment may be charged to more than one quota allocation.

(h) *Documentation. . . .*

(1) *Unprocessed western red cedar harvested from lands other than federal or state lands.* (i) A sworn affidavit by the applicant stating that the commodities listed on the application were not harvested from state or federal lands, were not produced from commodities harvested from state or federal lands, and did not become available for export through substitution of commodities so harvested or produced [sic]. If the applicant is not the harvester or producer of the commodities to be exported, the affidavit must identify the harvester or producer, and from each intermediate party or parties who held title to the commodities between harvesting and purchase by the applicant.

Forest Service Sale and Disposal of Timber, 36 C.F.R. § 223.10 (1982), reads in pertinent part:

Timber export and substitution restrictions.

(a) The following definitions apply to the provisions of this section:

(1) Export means either direct or indirect export to a foreign country and occurs on the date that a person enters into a contract or other binding transaction for the export of unprocessed timber or, if that date cannot be established, when unprocessed timber is found in an export yard or pond, bundled or otherwise prepared for shipment, or aboard an ocean-going vessel. An export yard or pond is an area where sorting and/or bundling of logs for shipment outside the United States is accomplished. Unprocessed timber, whether from National Forest System or private lands, is exported directly when exported by the National Forest timber purchaser. Timber is exported indirectly when export occurs as a result of a sale to another person or as a consequence of any subsequent transaction.

(2) Historic level means the average annual volume of unprocessed timber purchased or exported in calendar years 1971, 1972, and 1973.

(3) Private lands mean lands held or owned by a private person. Nonprivate lands include, but are not limited to, lands held or owned by the United States, a State or political subdivision thereof, or any other public agency, or lands held in trust by the United States for Indians.

(4) Substitution means the purchase of unprocessed timber from National Forest System lands to be used as replacement for unprocessed timber from private lands which is exported by the purchaser. Substitution occurs when (i) a person increases purchases of National Forest timber in any Calendar year more than 10 percent above their historic level and in the same calendar year exports unprocessed timber from private land in the tributary area; or (ii) a person increases exports of unprocessed timber from private land in any tributary area more than 10 percent above their historic level in any calendar year while they have National Forest timber under contract.

(5) Tributary area means the geographic area from which unprocessed timber is delivered to a specific processing facility or complex. A tributary area is expanded when timber outside an established tributary area is hauled to the processing facility or complex.

(6) Unprocessed timber, except western red cedar in the contiguous 48 States, means trees or portions of trees having a net scale content not less than 33-1/3 percent of the gross volume, or the minimum piece specification set forth in the timber sale contract, in material meeting the peeler and sawmill log grade requirements published in the January 1, 1980—Official Log Scaling and Grading Rules used by Log Scaling and Grading Bureaus on the West Coast; cants to be subsequently manufactured exceeding 8-3/4 inches in thickness; cants of any thickness reassembled into logs; and split or round bolts, except for aspen, or other roundwood not processed to standards and specifications suitable for end-product use. Unprocessed timber shall not

mean pulp (utility) grade logs and Douglas-fir special cull logs or timber processed into the following:

- (i) Lumber and construction timbers, regardless of size, sawn on four sides;
- (ii) Chips, pulp, and pulp products;
- (iii) Green veneer and plywood;
- (iv) Poles, posts, or piling cut or treated for use as such;
- (v) Cants cut for remanufacture, 8-3/4 inches in thickness or less;
- (vi) Aspen bolts, not exceeding 4 feet in length.

(7) Unprocessed western red cedar timber in the contiguous 48 States means trees or portions of trees of that species which have not been processed into (i) lumber of American Lumber Standards Grades of Number 3 dimension or better, or Pacific Lumber Inspection Bureau Export R-List Grades of Number 3 Common or better; (ii) chips, pulp, and pulp products; (iii) veneer plywood; (iv) poles, posts, or piling cut or treated with preservatives for use as such and not intended to be further processed; or (v) shakes and shingles; provided that lumber from private lands manufactured to the standards established in the lumber grading rules of the American Lumber Standards Association or the Pacific Lumber Inspection Bureau and manufactured lumber authorized to be exported under license by the Department of Commerce shall be considered processed.

(8) Person means an individual, partnership, corporation, association, or other legal entity and includes any subsidiary, subcontractor, parent company, or other affiliate. Business entities are considered affiliates for the entire calendar year when one controls or has the power to control the other or when both are controlled directly or indirectly by a third person during any part of the calendar year.

(9) Purchase occurs when a person is awarded a contract to cut National Forest timber or through the approval of a third party agreement by the Forest Service.

(10) Purchaser means a person that has purchased a National Forest Service timber sale.

(b) Unprocessed timber from National Forest System lands west of the 100th Meridian in the contiguous 48 States may not (1) be exported from the United States; (2) be used in substitution for unprocessed timber from private lands which is exported by the purchaser; or (3) be sold, traded, exchanged, or otherwise given to any person who does not agree to manufacture it to meet the processing requirements of this section and/or require such a processing agreement in any subsequent resale or other transaction. This limitation on export or substitution does not apply to species of timber previously found to be surplus to domestic needs or to any additional species, grades, or quantities of timber which may be found by the Secretary to be surplus to domestic needs.

(c) Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities. In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (a) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

(d) Prior to a determination by the Secretary of Agriculture that a species, grade, or quantity of unprocessed timber is surplus to domestic needs, a public hearing shall be held to seek advice and counsel on the needs of domestic users and processors. Notice of any such determination shall be published in the FEDERAL REGISTER. Any determination of surplus timber may be withdrawn by the Secretary following a public notice which permits in-

terested persons to comment. Public hearings will be conducted in accordance with the following procedures:

(1) Notice will be published in the FEDERAL REGISTER and in a newspaper of general circulation within the area affected by the proposed determination at least 15 days prior to the hearing and persons known to be interested will be notified directly.

(2) The time, place, and conduct of the hearing will be coordinated with the Department of the Interior and shall be at a convenient location within the area affected.

(3) The hearing record shall remain open for at least 10 calendar days following the hearing for receipt of additional written statements.

(e) For false certification of documents relating to export or substitution and/or other violations of export and substitution requirements by the purchaser of timber from National Forest System lands, the Forest Service may cancel the subject contract, debar the involved person or persons from bidding on National Forest timber, or initiate other action as may be provided by law or regulation.

II. State Statutes

1973 Cal. Stat. 657, an Act with the effective date of January 1, 1974, Cal. Pub. Res. Code § 4650.1 (West Supp. 1982) states as follows:

Sales to primary manufactures; dimensions; violations; penalty; rules and regulations

Notwithstanding any other provision of law, timber from state forests shall not be sold to any primary manufacturer, or to any person for resale to a primary manufacturer, who makes use of such timber at any plant not located within the United States unless it is sawn on four sides to dimensions not greater than 4 inches by 12 inches.

Any purchaser of timber from state forests who makes use of such timber in violation of this section shall be prohibited from purchasing state forest timber for a

period of five years and may have his license suspended for a period of up to six months.

The department may adopt appropriate regulations to prevent the substitution of timber from state forests for timber exported from private timberlands.

An Act of 1905, as amended, 1905 Idaho Sess. Laws 145, Idaho Code § 58-403 (1905) (Amended, 1921, 1935, and 1974):

Application to purchase timber—Limitations on sale of timber.—Any person desiring to purchase timber on any lands owned by the state, shall make application in writing to the director of the department of lands; which application shall contain a complete description by legal subdivisions of the lands upon which it is desired to purchase timber and a provision that if he is the successful bidder he will furnish such bond as may be required by the state board of land commissioners; conditioned, that he will comply with all rules and regulations made by the state board of land commissioners pertaining to the cutting and removal of said timber and the disposal of slashings and debris; the protection from fires or other damage of all trees or timber which are reserved from sale, and such other conditions as may be imposed by the state board of land commissioners with reference to any particular tract of timber sold; provided, however, that this provision does not prohibit the state board of land commissioners from offering for sale, or selling, timber without application having first been filed, and such authority is hereby expressly given to the state board of land commissioners. The state board of land commissioners are hereby required when contracting for the sale of timber on lands owned by the state to prescribe that the timber cut from said lands under said contract shall be manufactured into lumber or timber products within the state of Idaho; provided, that the sale of any timber to be used in the manufacture of wood pulp shall be excepted from the above provision.

Act of 1961, 1961 Or. Laws 700, 1963 Or. Laws 298, 1981 Or. Laws 823, Or. Rev. Stat. 526.805.

Processing of timber sold by state or local governments. All timber, except white (Port Orford) cedar timber, sold by the State of Oregon, or any of its political subdivisions,

shall be primarily processed in the United States. For purposes of this section 'primarily processed' shall mean that stage of manufacture next beyond the log form of said timber.

Act of 1981, 1981 Or. Laws 823, Or. Rev. Stat. 526.835 (formerly Or. Rev. Stat. 526.810):

Penalty for selling certain logs for delivery outside United States. Any person who wilfully purchases or sells for delivery outside of the boundaries of the United States in log form any timber, except white (Port Orford) cedar timber, severed from land owned by the State of Oregon or any political subdivision thereof shall be guilty of a misdemeanor.

APPENDIX F**OREGON ATTORNEY GENERAL'S STATEMENTS****No. 5203****April 18, 1961****Honorable George Van Hoomissen
State Representative**

You have requested the opinion of this office concerning the constitutionality of House Bill No. 1663, introduced and read for the first time on February 28, 1961.

The question of the bill's constitutionality centers in subsection (1) of § 2, which reads:

"(1) No timber sold by the State of Oregon or any political subdivision thereof shall be sold by the purchaser of such timber or subsequent purchasers of the logs obtained from such timber for delivery in log form beyond the continental limits of the United States. All contracts entered into by the State Board of Forestry for the sale of timber owned by the State of Oregon and all contracts entered into by any governing body of a political subdivision of the State of Oregon for the sale of timber owned by such political subdivision shall provide that no timber included in any such sale shall be sold for delivery in log form beyond the continental limits of the United States."

At the very outset this statute meets the full length impact of Article I, § 8, clause 3, of the Constitution of the United States. This clause provides:

"The Congress shall have Power * * *

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

It is sometimes expressed that state legislation, when it does not conflict with the laws or the Constitution of the United States, may operate in the field. This generalization must, of course, be qualified where the power of the national govern-

ment is exclusive. In the case of *Leisy v. Hardin*, (1889) 135 U.S. 100, 34 L. Ed. 128, 132, the court said:

"Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled. [citing cases]"

The proposed statute now under consideration occupies the position of imposing a burden upon foreign commerce and thus encroaches upon the exclusive power of Congress. This statute does not act upon the subject matter merely through local instruments only, while it is within the state, but acts directly in such a manner as to affect this commodity through its entire voyage.

It was pointed out in the above quoted case that where state laws alleged to be regulations of commerce among the states were sustained, they were laws dealing with bridges or dams across streams, wholly within the state, or police or health laws or other related areas which were not of a commercial nature.

In *Brown et al. v. The State of Maryland*, (U.S. 1827) 12 Wheat. 419, 6 L. Ed. 678, 685, the court stated:

" . . . There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. * * *"

To show the effect of such proposed legislation on the power of the national government we need only reverse the above statement in *Brown et al. v. The State of Maryland*, *supra*, and state that there is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its exportation from the country. The one would be a necessary consequence of the other.

It requires no great foresight and, in reality, only a brief retrospection to realize the consequences which have resulted and would again occur if such discriminatory powers were within the province of state legislation. The case of *The Du-buque & Sioux City Railroad Co. v. Richmond*, (U.S. 1874) 19 Wall. 584-590, 22 L. Ed. 173, 176, points out the principle that:

"The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation * * *."

My opinion, in view of the constitutional principles heretofore reviewed, is that House Bill No. 1663 is an invasion upon the exclusive power of Congress to regulate in the area of foreign commerce.

ROBERT Y. THORNTON,
Attorney General,
By E.C. Foxley, Deputy.

DEPARTMENT OF JUSTICE

100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4400
February 19, 1982

The Honorable Ted Bugas
State Representative
367 State Capitol
Salem, Oregon 97310

Re: Opinion Request OP-5216

Dear Representative Bugas:

This letter opinion is issued in response to four questions you ask concerning the constitutionality of various existing and proposed provisions of state law restricting the export of unprocessed logs grown in Oregon, on land owned by the state or by other public bodies.

We conclude that such laws are probably unconstitutional. This conclusion is based upon substantial research and analysis performed to this time. It is also consistent with an earlier opinion of this office issued two decades ago. Neither research nor analysis, however, has been completed to the extent we would feel necessary for the issuance of a formal opinion reaching a conclusion that an existing state law is unconstitutional. It would be our duty to defend the validity of any state law against challenge, unless it is clearly and unequivocally in violation of the state or federal constitutions.

Such further work, however, could not in our judgment be productive at this time. The case of *South-Central Timber Development, Inc. v. Le Resche*, 511 F Supp 139 (C Alaska 1981) is now on appeal, and the decision by the U.S. Court of Appeals for the Ninth Circuit (Case No. 81-3081) will probably be dispositive of most of the issues raised in your opinion request. Even to the extent the forthcoming decision is not dispositive, the Ninth Circuit decision must certainly be taken

into careful account. We therefore conclude that it would be both premature and wasteful of our resources to do the further work necessary to furnish you with a formal opinion, which presently could not be definitive because of the pending case.

We nevertheless furnish you with an outline of the research and reasoning which leads us to the conclusion stated in the second paragraph of this letter.

Your first question is whether ORS 526.805 to 526.835 violate the United States Constitution or the Oregon Constitution. ORS 526.805 requires that any timber (except Port Orford Cedar) sold by the state or any of its political subdivisions must be primarily processed in the United States. ORS 526.835 makes it a misdemeanor to purchase or sell such timber in log form severed from land owned by the state or any of its political subdivisions, for delivery outside of the United States.

ORS 526.815 formerly allowed a permit to be obtained for export of such timber if there was no reasonable market for it in the United States. Oregon Laws 1981, ch 823 repealed this and related statutes, and amended ORS 526.805 and 526.835 to delete references to such export permits.

The state cannot under any circumstances enact a law forbidding export of unprocessed timber generally, or of any product of Oregon, without being in clear violation of the Foreign Commerce Clause of the United States Constitution, United States Const Art I, sec 8 provides:

"The Congress shall have Power

"

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"

It was early established that this power is exclusive, and that the states cannot directly regulate interstate and, foreign commerce *as such* except to the extent that Congress has granted permission. *Brown v. Maryland*, 25 US 419 (1827); *Gibbons v.*

Ogden, 22 US 1 (1824); see *H. P. Hood & Sons, Inc. v. DuMond*, 336 US 525 (1949) (relating to the requirement of specific congressional authorization for state action). If a state statute is for a legitimate state end such as the enhancement of public health, safety, security, or conservation, and it does not unduly restrict interstate commerce (a balancing test), it is valid. See, e.g., *Huron Portland Cement Co. v. The City of Detroit*, 362 US 440 (1960); *Breard v. Alexandria*, 341 US 622 (1951); *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 US 179 (1950); *Mintz v. Baldwin*, 289 US 346 (1933); *Bradley v. Public Utilities Commission*, 289 US 92 (1933).

However, this analysis first requires the establishment of a legitimate state interest in the regulation. If such an interest does not exist, the state regulation is invalid, and attempts by states to interfere with interstate commerce for economic reasons are virtually *per se* invalid. *City of Philadelphia v. New Jersey*, 437 US 617 (1978).

In a closely analogous case, a Louisiana statute made it unlawful to export shrimp caught in Louisiana waters without the heads and hulls removed, i.e., "primarily processed." The real purpose, held the court, was to protect Louisiana processors, but even given the stated statutory purpose to satisfy local demands:

"... A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *Foster-Fountain Packing Co. v. Haydel*, 278 US 1, 10 (1928). (Citations omitted.)

The *Foster-Fountain* case can be distinguished on two grounds. First, ORS 526.805 deals not with privately-owned articles of trade but with state-owned timber. The "proprietary" exception to the commerce clause inhibitions on the states will be discussed immediately below. Secondly, ORS 526.805

affects foreign commerce, rather than interstate commerce. As stated in *Reeves, Inc. v. Stake*, 447 US 429, 438, n 9 (1980):

"... We note, however, that *Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged*. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979)." (Emphasis added.)

The statutory prohibition is justified only if the state's ownership of the timber permits an exception to the general rule. This "proprietary" exception is delineated in two recent United States Supreme Court cases.

In *Hughes v. Alexandria Scrap Corp.*, 426 US 794 (1976), the court dealt with a Maryland statutory scheme designed to rid its streets and highways of inoperable junk cars. The state paid a bounty for their destruction. Maryland scrap dealers were required to submit only an indemnity agreement in lieu of evidence of title to the scrapped vehicle, but out-of-state dealers were required to submit evidence of title which, as a practical matter, meant a cost to them of about \$10 per vehicle. Thus the \$18 bounty received by Maryland scrap dealers was only an \$8 bounty for out-of-state dealers. The natural result was to discourage transportation of hulks out of the state for scrapping, amounting to a burden on interstate commerce.

The court sustained the statute. Maryland, it said, was in effect a purchaser of the junk cars, and as such it could purchase from whomever it chose, and could favor Maryland dealers over out-of-state dealers. *The court made a substantial point of the fact that there was no prohibition on removal of junk cars from the state.*

"... Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. . . ." *Hughes v. Alexandria Scrap Corp.*, *supra*, 426 US at 806.

In *Reeves, Inc. v. Stake*, *supra*, 447 US 429, a 5-4 majority of the court upheld the right of the state of South Dakota to sell cement produced by a state-owned plant only to residents,

during a period when demand exceeded supply. This policy clearly burdened interstate commerce. As proprietor of a cement manufacturing plant, the state had the right to limit the benefits of the investment of its citizens to those same citizens.

The majority emphasized the state's investment in manufacturing facilities, and very pointedly stated: "Cement is not a natural resource, like coal, *timber*, wild game, or minerals." *Id.* at 443. It went on to point out that South Dakota did not seek to limit sales of limestone—necessary to manufacture cement—to South Dakota residents. Nor did South Dakota prohibit resident purchasers of cement from using that cement out of the state, or from immediately reselling to out-of-state purchasers.

Neither case, in our opinion, is of any support to validity of the Oregon statute. For purposes of this letter opinion, we point out only that neither Maryland nor South Dakota prohibited the flow of the commodity out of the state; Oregon does. South Dakota manufactured cement; Oregon's law deals with precisely one of the natural resources, timber, which the majority in *Reeves, Inc. v. Stake, supra*, emphasized was *not* involved in the South Dakota case. Considering the 5-4 split in that case, the absence of the factors (not all of which we have mentioned) relied on by the majority and the presence of countervailing factors which were absent in that case, it seems highly probable that the court would reach a different conclusion in this case.

In 30 Op Atty Gen 186 (1961) the Attorney General held that the measure which became ORS 526.805 to 526.835 was unconstitutional. HB 1663, enacted as Or Laws 1961, ch 700. The limited exception allowing export permits in the absence of a market has since been repealed, as noted above, and the prohibition is now unequivocal. Notwithstanding the presumption of constitutionality to which the measure became entitled when it was enacted, we are unable to find any real justification for a different result.

At the start of this opinion we referred to *South-Central Timber Development, Inc. v. La Resche*, *supra*, 511 F Supp 139. In that case the district court held that an Alaskan statute requiring primary manufacture in the state of timber sold by the state was an unconstitutional infringement upon interstate and foreign commerce. Oregon, in contrast, permits primary manufacture in other states—it is only foreign export for primary manufacture that is prohibited. This distinction does make a difference, in our opinion—if protection of a state's lumber manufacturing industry is not a valid basis for prohibiting export to other states or countries, protection of American lumber manufacturing industry is certainly beyond Oregon's power. It is reserved by the Commerce Clause to the United States.

We must point out that Oregon's statute is not unique. We have noted the Alaskan restrictions, adopted by regulation as authorized by Alas Acts Annot sec 76.130. Section 4650.1 of the California Public Resources Code forbids foreign export of unprocessed state timber. Idaho Code sec 58-403 requires primary manufacture within the state. If Alaska's statute falls, so too, it seems inevitable, will the California, Idaho, and Oregon provisions.

It is assertedly more significant that these state statutes forbidding foreign export merely carry out federal policy. In 1968, the Secretaries of Agriculture and Interior jointly imposed quotas on export of unprocessed logs, “. . . to maintain a viable domestic wood processing industry capable of processing the sustained yield of timber from the selected areas.”¹ This policy was then legislated by Congress in the Morse Amendment to the Foreign Assistance Act of 1968, 82 Stat. 966. Further restrictions were imposed in 1974 as a rider to PL

¹ This question, and most of the following information, is taken from USDA Forest Service General Technical Report PNW-63 (1978), “Log Export Restrictions of the Western States and British Columbia.”

93-120, sec 301, the Department of Interior Appropriations Act, and the same rider was attached to Interior appropriations acts in each succeeding year through 1981. PL 96-514, sec 302; 94 Stat 2983. The Forest Service and Bureau of Land Management have equivalent regulations. 36 CFR sec 223.10 (1981); 43 CFR secs 5400, 5420, 5440 (1980).

It is strongly argued that by thus carrying out federal policy, the Oregon statute does not operate to "... impair federal uniformity in an area where federal uniformity is essential." *Japan Line, Ltd. v. County of Los Angeles*, 441 US 434, 448 (1979). This misses the point that Congress has authority to regulate foreign commerce; Oregon does not, except to the extent that Congress grants permission. The same argument (with respect to interstate commerce) was made and expressly rejected in *H. P. Hood & Sons, Inc. v. DuMond*, supra, 336 US 525. There an action by an administrative agency of the State of New York which burdened interstate commerce was defended because it "coincides with, supplements and is part of the federal regulatory scheme." *Id.* at 540. The court went on to say:

"... We have no doubt that Congress in the national interest could prohibit or curtail shipments of milk in interstate commerce, unless and until local demands are met. Nor do we know of any reason why Congress may not, if it deems it in the national interest, authorize the states to place similar restraints on movement of articles of commerce. . . . It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.

"....

"Since the statute as applied violates the Commerce Clause and is not authorized by federal legislation pursuant to that Clause, it cannot stand. . . ." *Id.* at 542-545. (Emphasis added.)

Congress may and has acted to restrict the foreign export of unprocessed logs removed from federal lands. Oregon, we

believe, may not do so with respect to its own lands, and Congress has not given it permission to do so.

We do not, for purposes of this letter opinion, go on to consider your additional questions relating to proposed legislation which would further implement the ban on exports by a "no substitution" clause or by variations of such a clause. If ORS 528.805 falls, these too would fall with it. If ORS 528.805 is valid, such provisions may well also be valid, but substantial additional analysis would be necessary to reach a conclusion.

We touch upon two further matters. In our opinion No. 8097 issued February 11, 1982, we held that the State Land Board has ultimate authority to manage the constitutional Common School Fund lands, and that the legislature cannot deprive it of this authority. If ORS 526.805 and 526.835 are valid, they are valid because the state owns the logs involved. As applied to constitutional Common School Fund lands, the legislature does *not* have authority to act as owner. The State Land Board has that authority. If applied to those lands, and if so doing would impair the ability of the State Land Board to sell timber on the most advantageous terms, ORS 526.805 and 526.835 would impair the authority of the Land Board to manage. We therefore unequivocally state that these statutes cannot constitutionally be applied to sale of logs from constitutional Common School Fund lands, if the Land Board finds that sale for export would be a proper management decision.

In a letter opinion OP-5332 dated February 12, 1982, we have just informed the State Forester that no export permit can be issued under former ORS 526.815 for export of logs cut under a contract predating repeal of that statute. If as we believe in all probability ORS 526.805 is unconstitutional, the purchaser is free to export the logs without a permit. Whether in light of this opinion it is willing to do so is a matter for that

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purchaser to decide on the basis of the advice of its own counsel.

Very truly yours,

/s/ Dave Frohnmayer
DAVE FROHNMAYER
Attorney General

DF:JAR:mc

APPENDIX G**ALASKA GOVERNOR'S POLICY STATEMENT****POLICY STATEMENT ON PRIMARY MANUFACTURE****Section 76.130, "Timber Sale Regulations"**

Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Timber processing wastes from west of 141° Longitude when manufactured into chips are considered to have received primary manufacture and may be exported. Timber processing wastes from east of 141° Longitude in Southeast Alaska when manufactured into chips are considered to have received primary manufacture and export may be permissive only on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue, or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only; e.g., to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 76.130 of the "Timber Sale Regulations" and supersedes all previous policy statements and/or resolutions.

/s/ William A. Egan
WILLIAM A. EGAN
Governor of Alaska

DATE May 7, 1974

APPENDIX H

STATISTICAL ABSTRACT OF THE UNITED STATES

Section 25

**FORESTS and
FOREST PRODUCTS**

This section presents data on the area, ownership, and timber resource of commercial timberland; forestry statistics covering the National Forests and Forest Service cooperative programs; product data for lumber, pulpwood, woodpulp, paper and paperboard, turpentine, and rosin, and similar data.

The principal sources of these data are *An Analysis of the Timber Situation in the United States, 1952-2030, Appendix 3*; *U.S. Timber Production, Trade, Consumption, and Price Statistics, 1950-80*; *National Forest System*; and *Wildfire Statistics*, issued annually by the Forest Service of the Department of Agriculture; *Agricultural Statistics* issued by the Department of Agriculture; and reports of the census of manufacturers (taken every five years) and the monthly and annual *Current Industrial Reports*, issued by the Bureau of the Census. Additional information is published in the *Annual Report* of the National Forest Reservation Commission; the monthly and annual *Naval Stores* of the Department of Agriculture; the monthly *Survey of Current Business* of the Bureau of Economic Analysis; and the annual *Wood Pulp Statistics* and *The Statistics of Paper and Paperboard* of the American Paper Institute, New York, N.Y.

The Bureau of the Census also collects data on foreign trade of forest products. The Bureau of Labor Statistics publishes monthly and annually statistics of producer prices for lumber.

The completeness and reliability of statistics on forests and forest products vary considerably. The data for forest land area and stand volumes are much more reliable for areas which have been recently surveyed than for those for which only estimates are available. Estimates of fire damage or causes of fires for Federal lands are considered much better than those

for private lands. In general, more data are available for lumber and other manufactured products such as veneer and plywood, etc., than for the primary forest products such as poles and piling and fuelwood.

Historical statistics.—Tabular headnotes provide cross-references, where applicable, to *Historical Statistics of the United States, Colonial Times to 1970*. See Appendix I.

Forest Land—Ownership, Sawtimber, and Growing Stock

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NO. 1257. FOREST LAND AREA, COMMERCIAL AREA OWNERSHIP, AND VOLUME OF SAWTIMBER AND GROWING STOCK, BY STATES: 1977 (JAN. 1)

STATE	Total forest land (1,000 acres)	COMMERCIAL TIMBERLAND OWNERSHIP ¹ (1,000 acres)				SAWTIMBER NET VOLUME ²		GROWING STOCK NET VOLUME ³	
		Total	Federally owned or managed ⁴	State, county, municipal	Private	Total (net bd. ft.)	Softwood (net bd. ft.)	Total (net cu. ft.)	Softwood (net cu. ft.)
U.S.	736,588	483,486	106,472	38,349	346,704	2,576,940	1,966,466	716,966	456,779
Ala.	177,662	106,141	11,864	18,548	135,629	208,621	98,994	173,146	44,674
Ark.	22,461	32,966	779	1,317	39,890	78,897	43,888	41,848	23,383
Cal.	1,861	1,808	2	144	1,659	8,870	1,305	2,662	425
Conn.	17,718	16,864	73	468	16,323	36,118	25,232	22,604	18,880
Del.	2,952	2,786	10	258	2,432	7,688	4,186	3,959	1,430
Fla.	5,014	4,692	478	108	4,112	14,564	8,607	7,386	3,536
Idaho	404	385	-	32	383	687	289	412	106
Ill.	4,312	4,430	213	209	4,008	10,391	4,189	4,989	1,826
Ind.	86,886	46,416	1,986	4,884	48,356	191,989	17,894	58,491	7,666
Iowa	362	364	1	12	370	1,383	426	625	169
Kent.	2,653	2,525	26	291	2,208	6,167	1,726	3,462	793
La.	1,898	1,857	26	391	1,536	3,127	679	1,534	291
Me.	17,216	14,243	58	636	13,351	26,086	7,771	13,256	3,523
Md.	16,626	16,624	503	2,886	12,453	34,251	3,714	23,465	1,776
Mass.	11,680	11,484	682	229	10,363	29,934	2,901	14,153	1,092
Mich.	81,644	47,579	6,736	11,666	28,944	97,796	26,994	44,977	11,891
Minn.	18,270	16,776	2,472	3,547	12,556	42,441	12,205	16,214	5,081
Miss.	16,706	13,666	2,356	4,962	8,367	24,831	8,531	11,454	3,477
Mo.	422	401	114	10	281	474	-	257	60
N. Dak.	336	223	74	3	146	448	86	134	33
N. H.	14,808	14,478	1,753	2,934	9,792	29,797	9,163	13,457	3,340
N. J.	43,873	41,763	2,646	798	37,411	83,769	4,836	26,219	1,686
N. Y.	2,810	2,662	256	11	2,413	7,094	30	2,180	24
Ohio	3,843	3,815	258	171	3,405	10,967	256	3,796	87
Ore.	1,561	1,480	57	66	1,348	3,418	14	1,036	6
Penn.	1,344	1,187	27	10	1,151	2,030	1	564	1
R.I.	12,161	11,902	919	77	11,007	26,941	2,291	11,668	960
S. Dak.	12,876	12,269	1,313	218	10,737	15,570	1,266	6,022	362
Tenn.	1,526	786	67	12	710	1,737	510	442	119
Tex.	6,147	6,029	180	237	5,612	14,341	433	4,326	139
Utah	368,178	168,646	14,466	3,346	176,318	614,769	341,623	262,090	97,136
Va.	46,716	47,677	3,897	683	42,697	171,461	74,317	99,966	35,323
W. Va.	20,043	16,562	1,365	269	17,768	76,794	26,376	36,121	15,742
Wisc.	12,249	12,176	682	233	11,261	46,637	22,609	14,201	7,976
Wyo.	18,417	16,670	252	14,017	93,771	18,134	18,687	6,512	3,468
Ala.	42,296	46,142	3,640	636	36,486	112,476	74,676	46,124	34,486
Ark.	17,040	15,330	1,623	462	13,215	31,950	21,129	11,723	7,525
Cal.	25,256	24,812	1,417	126	23,269	80,529	52,949	28,462	16,860
Col. Gulf.	91,237	80,667	3,896	1,916	66,787	163,261	67,993	81,977	33,666
Del.	21,361	21,333	953	209	20,334	69,566	46,506	22,340	12,336
Fla.	16,716	16,564	1,216	461	14,634	60,642	36,370	17,254	8,929
Idaho	12,161	12,630	919	346	11,556	32,313	6,024	12,904	2,267
Ill.	64,622	46,566	4,614	736	44,226	166,476	164,734	46,916	26,646
Ind.	18,262	18,207	2,716	256	15,233	48,966	26,462	17,146	7,060
Iowa	14,556	14,527	664	209	13,522	63,416	36,646	17,431	8,417
Kent.	6,512	6,456	463	106	5,786	6,067	3,576	2,052	1,010
La.	22,276	12,613	740	66	11,717	90,025	36,676	12,672	6,356
Me.	362,691	126,396	76,662	6,466	46,621	1,666,311	1,647,662	326,614	214,666
Md.	177,136	53,262	26,662	5,636	16,161	96,236	911,699	196,136	173,166
Mass.	119,146	11,156	6,426	2,436	266	186,666	186,426	42,676	46,626
Mich.	29,616	24,211	14,291	926	8,094	421,172	141,186	76,584	74,726
Minn.	23,161	17,626	6,936	2,266	8,726	320,296	313,326	63,523	67,606
Miss.	46,136	17,361	5,661	546	9,122	264,716	266,611	46,676	46,676
Mo.	46,132	16,323	6,566	106	7,626	263,666	266,584	46,666	45,676
N. H.	1,666	946	12	462	694	1,047	17	202	2
N. J.	86,662	33,476	22,267	1,666	6,667	396,446	267,667	66,666	67,666
N. Y.	21,727	13,541	6,640	666	3,021	138,616	21,664	31,662	31,662
Ohio	22,556	14,366	8,266	534	4,566	67,234	66,236	37,777	27,661
Ore.	1,267	1,244	956	70	216	5,616	5,667	1,663	1,627
Penn.	10,026	4,334	3,366	111	666	27,676	26,662	7,166	6,662
R.I.	83,666	34,267	17,663	666	6,641	126,626	112,613	91,176	26,626
S. Dak.	16,464	3,666	3,666	34	166	22,711	26,666	4,666	4,703
Tenn.	22,271	11,516	7,662	394	3,116	64,541	66,664	16,626	12,664
Tex.	7,662	124	61	6	66	1,266	1,366	362	346
Utah	16,662	5,536	3,436	171	1,627	25,916	34,346	6,366	5,726
Va.	15,567	3,466	2,506	236	661	16,566	14,567	4,446	3,562

- Represents zero. 2 Less than 500,000 cubic feet. 3 Commercial timberland is forest land which is producing or is capable of producing crops of industrial wood and not withdrawn from timber production by statute or administrative regulation. Areas qualifying as commercial timberland have the capability of producing an average of 26 cubic feet per acre per year of industrial wood in natural stands. Currently unproductive and marginal areas are included. 4 Includes Indian lands. 5 Net volume in cubic feet of the saw log portion of two sawtimber trees in forest land, measured 4-inch log rule. 6 Net volume in cubic feet of two sawtimber and polelimber trees from stump to a minimum 4-inch log (at central stem) outside bark or to the point where the central stem breaks into limbs.

Source: U.S. Forest Service, An Analysis of the Timber Situation in the United States, 1962-2000, Appendix 2.

Section 26

Fisheries

This section presents statistics on commercial fishing and the fish processing industry. The principal sources of these data are *Fishery Statistics of the United States*, and *Fisheries of the United States*, both issued annually by the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA)

The NMFS collects and disseminates data on commercial landings of fish and shellfish, freezings and holdings of fishery products, fish meal and oil production, and foreign trade in fishery products. Quarterly data are published on U.S. output of fish sticks, fish portions, and breaded shrimp. Annual reports include quantity and value of commercial landings of fish and shellfish (by species, region, State, and type of fishing gear), disposition of landings, number of fishermen, and number and kinds of fishing vessels and fishing gear. Reports for the fish-processing industry include annual output of canned, packaged, and industrial products and, for the wholesaling and fish processing establishments, annual and seasonal employment, and number of firms, by product and State. Annual data are published on foreign trade in fishery products and per capita consumption of edible fishery products.

The Magnuson Fishery Conservation and Management Act of 1976 established a Fisheries Conservation Zone (FCZ) which gives the Federal Government exclusive authority over domestic and foreign fisheries within 200 nautical miles of U.S. shores and over certain living marine resources beyond the FCZ. Within the FCZ, the total allowable level of foreign fishing, if any, is that portion of the "optimum yield" not harvested by U.S. vessels. Adjustments in the "optimum yield" level may occur periodically. For details, see *Fisheries of the United States, 1980*. The NMFS collects and disseminates data on catches by foreign fishing vessels in the FCZ.

The catch value as presented in various tables is "ex-vessel," or value at the dock. It represents the price received by fishermen and vessel owners for fish, shell-fish, etc.

Historical statistics.—Tabular headnotes provide cross-references, where applicable, to *Historical Statistics of the United States, Colonial Times to 1970*. See Appendix I.

NO. 1279. FISHERIES—FISHERMEN AND CRAFT, 1976, AND CATCH, 1978 AND 1979, BY AREAS

[See Historical Statistics, Colonial Times to 1970, series L 236-253, for data on quantity and ex-vessel value of catch]

AREA	1976 ¹			1978		1979					
	Fisher- men (1,000)	Fishing vessels	Fishing boats (1,000)	Total catch (mil. lb.)	Value (mil. dol.)	Catch (mil. lb.)			Value of catch (mil. dol.)		
						Total	Fin- fish	Shell- fish	Total	Fin- fish	Shell- fish
United States.....	² 173.6	² 18,875	² 85.9	6,829	1,854	6,267	5,132	1,135	2,234	1,114	1,120
New England States.....	30.5	855	15.6	661	256	709	618	91	302	144	158
Middle Atlantic States.....	17.7	580	12.5	201	79	228	167	61	82	26	66
Chesapeake Bay States.....	25.0	1,839	15.4	599	94	639	513	126	122	37	85
South Atlantic States.....	10.6	1,421	6.0	399	96	488	398	90	145	54	91
Gulf States.....	26.1	5,189	10.0	2,267	473	2,129	1,649	280	530	167	423
Pacific Coast States.....	48.4	7,183	13.8	1,741	821	1,625	1,441	484	1,006	711	295
Great Lakes States.....	1.1	184	.5	66	10	49	49	-	11	11	-
Mississippi River States.....	11.7	-	11.0	58	13	³ 86	83	3	15	14	1
Hawaii.....	2.7	101	1.3	14	12	14	14	(2)	11	10	1

- Represents zero. ² Less than 500,000 pounds or \$500,000. ³ As of Dec. 31. ⁴ Refers to craft having capacity of less than 5 net tons. ⁵ Exclusive of duplication among regions. Computation of area amounts will not equal U.S. total.

⁶ Mississippi River and other areas.
Source: U.S. National Oceanic and Atmospheric Administration, *Fishery Statistics of the United States, annual*, and *Fisheries of the United States, annual*.

Section 27

Mining and Mineral Products

This section presents data relating to mineral industries and their products, general summary measures of production and employment, and more detailed data on production, prices, imports and exports, consumption, and distribution for specific industries and products. Data on mining and mineral products may also be found in sections 29 and 33 of this *Abstract*; data on mining employment may be found in section 13.

"Mining" comprises the extraction of minerals occurring naturally (coal, ores, crude petroleum, natural gas) and quarrying, well operation, milling, refining and processing and other preparation customarily done at the mine or well site or as a part of extraction activity. (Mineral preparation plants are usually operated together with mines or quarries.) Exploration for minerals is included as is the development of mineral properties.

The principal governmental sources of these data are the three-volume *Minerals Yearbook*, published by the Bureau of Mines, Department of the Interior, and various monthly and annual publications of the Energy Information Administration, Department of Energy. In addition, the Bureau of the Census conducts a census of mineral industries every 5 years. Non-government sources include the *Annual Statistical Report* of the American Iron and Steel Institute, Washington, D.C.; *Metals Week* and the monthly *Engineering and Mining Journal*, issued by McGraw-Hill Publishing Co., New York; *The Iron Age*, issued weekly by the Chilton Co., Philadelphia; and the *Joint Association Survey of the U.S. Oil and Gas Industry*, conducted by the American Petroleum Institute, Independent Petroleum Association of America, and Mid-Continent Oil and Gas Association.

Mineral statistics, with principal emphasis on commodity detail, have been collected by the Geological Survey or by the

Bureau of Mines since 1880. Current data in Bureau of Mines publications include quantity and value of nonfuel minerals produced, sold or used by producers, or shipped; quantity of minerals stocked; crude materials treated and prepared minerals recovered; and consumption of mineral raw materials. The U.S. Mine Safety and Health Administration also collects and publishes data on workhours, employment, and accidents and injuries in the mineral industries, except petroleum and natural gas. In October 1977, fuel data collection activities of the Bureau of Mines were transferred to the Energy Information Administration.

Censuses of mineral industries have been conducted by the Bureau of the Census at various intervals since 1840. Beginning with the 1967 census, legislation provides for a census to be conducted every fifth year for years ending in "2" and "7." The censuses provide, for the various types of mineral establishments, information on operating costs, capital expenditures, labor, equipment, and energy requirements in relation to their value of shipments and other receipts. Commodity statistics on many manufactured mineral products are also collected by the Bureau at monthly, quarterly, or annual intervals and issued in its *Current Industrial Reports* series. Included in this series, beginning in 1973, is the *Annual Survey of Oil and Gas*.

In general, figures shown in the individual commodity tables include data for outlying areas, and may therefore not agree with summary table 1308. Except for crude petroleum and refined products, the export and import figures include foreign trade passing through the customs districts of United States and Puerto Rico, but exclude shipments between U.S. territories and the customs districts.

Historical statistics.—Tabular headnotes provide cross-references, where applicable, to *Historical Statistics of the United States, Colonial Times to 1970*. See Appendix I.

NO. 1308. MINERAL PRODUCTION AND VALUE, 1970 TO 1979.

[Data represent production as measured by mine shipments, mine sales, or marketable production 13-37, for

UNIT	UNIT	PRODUCTION QUANTITY					
		1970	1971	1972	1977	1978	1979
1 Total mineral production	(X)	(X)	(X)	(X)	(X)	(X)	(X)
2 Mineral fuels	(X)	(X)	(X)	(X)	(X)	(X)	(X)
3 Coal bituminous and lignite	Mt sh. ton	803	848	879	891	885	776
4 Pennsylvania anthracite	Mt sh. ton	10	6	6	6	5	5
5 Natural gas (wet)	Bt cu ft	21,921	20,108	19,932	20,025	19,874	20,471
6 Petroleum (crude)	Mt bbl.	3,517	3,067	2,976	3,006	3,178	3,121
7 Uranium *	Mt lb	23.1	23.2	25.5	29.9	37.0	37.5
8 Nonmetallic minerals	(X)	(X)	(X)	(X)	(X)	(X)	(X)
9 Abrasive stone *	Sb ton	3,085	2,952	2,898	2,200	467	1,949
10 Asbestos	1,000 sh. ton	125	99	115	102	103	103
11 Asphalt and related bitumens (native) *	1,000 sh. ton	1,361	1,302	2,012	1,227	1,867	1,814
12 Barite	1,000 sh. ton	954	1,318	1,234	1,494	2,112	1,937
13 Boron minerals	1,000 sh. ton	1,041	1,172	1,243	1,468	1,584	1,590
14 Bromine	Mt lb	350	407	480	434	447	503
15 Calcium chloride	1,000 sh. ton	633	594	649	710	773	720
16 Carbon dioxide, natural (estimated)	Mt cu ft	1,110	1,070	1,287	1,617	2,016	2,006
17 Cement, Portland	Mt sh. ton	73.2	68.9	71.2	78.3	90.0	79.0
18 Masonry	Mt sh. ton	3.0	2.9	3.3	3.8	4.1	3.7
19 Clays	Mt sh. ton	54.9	48.0	52.4	53.2	58.9	54.7
20 Dolomite	1,000 sh. ton	586	573	631	646	651	717
21 Emery	1,000 sh. ton	(0)	3.5	(0)	(0)	(0)	(0)
22 Feldspar	1,000 sh. ton	728	670	740	734	736	740
23 Fluorapatite	1,000 sh. ton	389	140	108	189	129	109
24 Garnet (aluminous)	1,000 sh. ton	16.9	17.2	24.8	20.0	26.7	21.2
25 Gem stones (estimated)	(X)	(X)	(X)	(X)	(X)	(X)	(X)
26 Gypsum	Mt sh. ton	9.4	8.9	12.0	13.4	14.9	14.6
27 Helium *	Mt cu ft	4,600	1,079	1,239	1,494	1,580	1,872
28 Limestone	Mt sh. ton	18.7	18.1	20.2	18.9	20.4	20.8
29 Magnesium compounds *	1,000 sh. ton	708	(0)	(0)	830	(0)	(0)
30 Mica, Scrap	1,000 sh. ton	119	135	141	176	182	170
31 Sheet	1,000 lb	-	5.0	5.0	(0)	(0)	-
32 Peat	1,000 sh. ton	526	748	731	736	750	796
33 Perlite	1,000 sh. ton	456	512	552	597	641	682
34 Phosphate rock	Mt sh. ton	38.7	41.8	48.2	52.1	55.2	58.9
35 Potash *	1,000 sh. ton	2,729	2,094	2,501	2,461	2,543	2,632
36 Pumice	1,000 sh. ton	3,036	3,882	4,134	4,009	4,757	4,414
37 Pyrites	1,000 sh. ton	(0)	625	750	676	786	1,032
38 Salt (common)	Mt sh. ton	45.9	41.0	44.2	43.4	42.9	45.6
39 Sand and gravel	Mt sh. ton	944	796	885	929	946	979
40 Sodium carbonate (natural)	1,000 sh. ton	2,686	4,328	5,216	5,229	6,790	(0)
41 Sodium sulfate (natural)	1,000 sh. ton	902	987	963	926	905	933
42 Stone *	Mt sh. ton	889	801	902	935	1,051	1,089
43 Sulfur, Frasch process	1,000 sh. ton	6,504	6,077	6,840	5,935	5,645	7,359
44 Talc, steapsins, pyrophyllite	1,000 sh. ton	1,028	966	1,062	1,205	1,284	1,453
45 Teph	1,000 sh. ton	66	81	124	124	116	116
46 Vermiculite	1,000 sh. ton	265	300	304	339	337	346
47 Nonmetallic minerals, undistributed **	(X)	(X)	(X)	(X)	(X)	(X)	(X)
48 Metals	(X)	(X)	(X)	(X)	(X)	(X)	(X)
49 Antimony ore and concentrates	Sb ton **	1,130	889	882	910	(0)	(0)
50 Bauxite	1,000 sh. ton **	2,982	1,772	1,559	1,591	1,843	1,780
51 Copper *	1,000 sh. ton	1,730	1,413	1,806	1,904	1,496	1,591
52 Gold *	1,000 fine oz.	1,743	1,082	1,548	1,100	899	900
53 Iron ore, pellets **	Mt sh. ton **	67.2	73.7	77.1	84.1	83.2	86.2
54 Lead *	1,000 sh. ton	579	621	610	567	584	579
55 Manganese ore **	1,000 sh. ton **	369	159	257	219	312	341
56 Mercury	70 lb. Sack	37,299	7,260	28,132	28,244	24,000	29,400
57 Molybdenum **	Mt lb	110	105	115	125	131	144
58 Nickel **	1,000 sh. ton	18.9	17.9	18.5	14.3	13.5	15.1
59 Silver *	Mt fine oz.	46.0	34.9	34.3	36.2	36.4	36.1
60 Titanium concentrates, ilmenite *	1,000 sh. ton **	921	702	918	940	891	946
61 Tungsten ore and concentrates	1,000 sh. **	6,312	6,490	6,969	6,927	6,991	6,996
62 Vanadium *	Sb ton	5,319	4,745	7,376	6,901	4,372	5,020
63 Zinc *	1,000 sh. ton	584	496	566	566	566	566
64 Metals, undistributed **	(X)	(X)	(X)	(X)	(X)	(X)	(X)

* Reserves only. ** Withheld to avoid disclosing national security data. NA Not available. S Not sufficient.
 56 47 sh. ton. * Reserves only of ore, etc. * Conventional production, including production, processing, and related items. * Common byproducts (minerals and chemicals and products). * Value included in "Nonmetallic minerals, undistributed." * Crude and refined. * From sea water and brines, except for metals (M.O. only). * By-product.
 58 100,000 lb. Sack. * Excludes chemical stock, chemical process and equipment, and ground equipment. S of mineral character is talc, fluorspar, asbestos, soap and soda.

Mineral Production and Value

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AND PRINCIPAL PRODUCING STATES, 1979

(Including consumption by producers) See Historical Statistics, Colonial Times to 1970, series M (selected values)

PRODUCTION VALUE (\$B. 1982)						Principal producing States ranked by quantity, 1979
1970	1975	1976	1977	1978	1979	
26,513.3	29,396.3	24,920.6	73,056.3	51,116.8	106,852.7	(x)
18,948.9	44,977.4	49,612.6	56,116.3	62,963.3	82,888.6	(x)
3,772.7	12,472.5	13,189.5	13,705.2	14,486.5	18,243.0	Ky., W. Va., Pa.
107.3	200.1	211.3	204.3	117.8	183.7	Pa.
3,745.7	8,945.1	11,571.8	15,825.0	18,076.5	24,115.1	La., Tex., Ohio, N. Mex.
11,173.7	23,118.1	24,229.5	25,790.7	26,502.9	26,453.4	Tex., Alaska, La., Calif.
148.5	243.8	410.5	580.1	796.8	863.4	N. Mex., Wyo., Tex.
5,785.8	9,494.0	10,616.8	11,702.6	13,525.8	15,448.0	(x)
0	1.1	1.4	3.2	1.3	1.7	Mont., W. Va., Ark.
10.7	14.2	23.7	25.3	26.0	26.9	Calif., W. Va.
8.9	17.8	17.8	13.9	19.3	25.6	Tex., Utah, Ala., Mo.
12.6	21.2	28.7	30.3	44.0	46.0	Nev., Mo., Ga.
95.8	158.8	184.9	236.2	278.9	310.2	Calif.
90.8	113.1	112.3	98.7	100.0	117.0	Ark. and Mich.
18.2	29.0	32.9	45.0	52.9	61.9	Mich. and Calif.
2	3	3	3	3	3	N. Mex., Colo., Utah, Calif.
1,586.7	2,015.8	2,300.4	2,727.6	3,229.6	3,850.4	Calif., Tex., Pa., Mich.
67.5	111.8	138.6	160.1	208.6	254.8	Calif., Tex., Wyo., N.C.
287.9	424.6	526.7	579.2	717.3	848.1	Calif., Nev., Wash., Oreg.
32.6	48.8	55.0	63.9	73.4	90.3	N.Y.
(1)	(1)	(1)	(1)	(1)	(1)	N.C., Conn., Ga., Ohio
9.6	11.7	17.5	17.2	18.2	21.5	N. Nev., Tex., Ariz.
13.9	10.9	17.9	16.5	13.3	12.2	N.Y., Idaho, Maine
1.9	1.7	2.7	2.2	3.3	2.0	N.A.
2.4	13.9	8.9	8.9	8.9	8.2	Mich., Tex., Iowa, Calif.
25.1	44.7	58.9	74.3	82.7	96.9	Kans., Tex., Ohio
64.2	23.9	25.9	30.7	31.9	34.2	Ohio, Pa., Min., Tex.
96.2	523.6	609.0	686.5	749.7	862.5	Mich., Calif., N.J., Fla.
82.4	(1)	(1)	127.7	(1)	(1)	N.C., S.C., N. Mex., Ark.
2.5	5.2	8.8	7.3	6.0	7.8	Mich., Pa., Ill., Ind.
-	(2)	(2)	(1)	(1)	(1)	N. Mex., Calif., Ariz., Idaho
6.0	12.3	12.1	12.5	13.0	15.5	Fla., Idaho, N.C., Tenn.
0	7.3	9.4	10.8	13.7	16.4	N. Mex., Utah, Calif.
203.2	1,122.2	949.4	821.7	828.8	1,045.7	Ariz., Utah, N. Mex., Mont.
96.1	223.1	210.8	208.9	226.5	279.2	Utah, S. Dak., Nev., Ariz.
4.7	11.2	10.5	12.0	14.5	16.0	Mont., S.C., Va.
(1)	4.8	6.2	7.0	12.3	17.1	Idaho and Mont.
304.6	368.1	431.0	451.6	498.3	538.4	Ark., Ala., Ga.
1,116.7	1,340.3	1,774.0	2,028.0	2,302.0	2,427.0	Ariz., Utah, N. Mex., Mont.
58.3	182.6	259.3	337.5	371.3	(1)	Utah, S. Dak., Nev., Ariz.
10.9	27.7	32.7	29.3	27.9	29.7	Mont., S.C., Va.
1,488.6	2,120.3	2,221.0	2,458.9	2,865.7	3,290.0	Idaho and Mont.
151.8	304.0	300.0	294.7	279.9	449.4	Ark., Ala., Ga.
7.8	8.9	9.9	13.1	15.8	20.4	Ariz., Utah, N. Mex., Mont.
.5	.8	.8	.8	.8	6.3	Utah, S. Dak., Nev., Ariz.
6.5	13.6	14.0	16.6	18.7	22.0	Mont., S.C., Va.
34.4	167.2	169.5	98.0	222.8	740.5	Idaho and Mont.
3,779.5	4,914.9	5,882.2	5,233.9	6,366.5	6,815.1	Ark., Ala., Ga.
(1)	2.1	.8	1.3	(1)	(1)	Ariz., Utah, N. Mex., Mont.
30.1	25.1	26.6	29.0	32.2	34.9	Utah, S. Dak., Nev., Ariz.
1,984.5	1,814.8	2,238.0	2,099.3	1,980.3	2,585.7	Mont., Mich., Calif., Wyo.
63.4	169.9	131.3	163.2	163.3	296.3	Me., Idaho, Colo., Va.
941.7	1,820.6	1,871.0	1,423.0	2,401.0	2,814.0	Mont., N. Mex., S.C.
179.9	267.2	281.6	363.9	393.5	656.9	Nev. and Calif.
(1)	1.4	2.3	2.2	3.1	2.9	Conn., Ariz., Utah, N. Mex.
11.1	1.2	2.6	3.6	3.7	6.3	Idaho, Ariz., Mont., Colo.
180.1	269.3	323.5	468.4	607.9	871.1	Idaho, Ariz., Mont., Colo.
(1)	(1)	(1)	(1)	(1)	(1)	Idaho, Ariz., Mont., Colo.
79.7	154.4	148.3	178.3	212.7	432.5	Fla., N.Y., N.J.
18.6	26.9	27.6	26.2	26.6	28.0	Calif., Conn., Nev., Utah
23.6	26.1	37.3	55.1	66.7	96.8	Conn., Utah, Ariz., Idaho
34.9	48.3	61.3	74.5	88.6	75.9	Tenn., Ill., N.J., Idaho
163.7	268.1	268.5	266.7	265.9	219.8	(x)
58.4	127.6	122.5	147.6	128.9	186.5	(x)

¹⁰ Conversion value of items that cannot be disclosed. ¹¹ Arbitrary estimate. ¹² Included with "Other, undistributed."

¹³ Other estimate. ¹⁴ Reporting shipments excluding freight and carrier. ¹⁵ Gross weight. ¹⁶ 5 to 25 percent less.

¹⁷ Content of concentrate. ¹⁸ Content of ore and concentrate. ¹⁹ Tons per car.

Source: U.S. Bureau of Mines, Minerals Factsheet and Improving 1977 for mineral facts, from U.S. Energy Information Administration, Energy Data Reports.

APPENDIX I

**Excerpt From Final Draft, *The Log Export Issue: An Analysis*
(Jan. 6, 1983)**

**JOINT LEGISLATIVE COMMITTEE ON TRADE AND
ECONOMIC DEVELOPMENT**

**Room H-197, State Capitol
SALEM, OREGON 97310
(503) 378-8811**

The following report on log exports from Oregon has been prepared by the Joint Committee on Trade & Economic Development during the 1981-83 interim. The report was mandated by the 1981 Legislature.

This Committee has recognized that timber harvesting is a major Oregon industry and that Oregon's economic future is tied to its growth as an international trader. The Committee sees Oregon's ports and their workforces as a vital and underdeveloped tool for economic recovery & our trading partners as our economic growth partners. The professional business of trading worldwide is a business not yet understood by many Oregonians, but one critical to a prosperous future for this state.

The extensive research done for this report by Committee members and by the Committee's staff leads to conclusions which point to the best direction for Oregon as a state to follow for the maximum benefit of its people and other resources. It is not swayed by emotionalism or reaction to any special interest group. It puts no industry or group above any other. It may, therefore, anger some industries or special interest groups, but as members of the legislature of Oregon these Committee members have clearly put first this state's crucial long term interests. They, and I, sincerely hope that the full membership of the Senate & House will do the same.

Sincerely,

/s/ **RICHARD P. BULLOCK**
Richard P. Bullock

**JOINT LEGISLATIVE COMMITTEE ON TRADE AND
ECONOMIC DEVELOPMENT**

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**FINAL DRAFT
THE LOG EXPORT ISSUE:
AN ANALYSIS**

**As Prepared For
Joint Legislative Committee On Trade & Economic
Development
For The 1981-83 Interim**

**January 6, 1983
Prepared By: Staff**

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THE LOG EXPORT ISSUE: AN ANALYSIS

INTRODUCTION

Prohibiting timber companies that export raw logs off their private lands from bidding on state timber sales was one of the major issues of the 1981 Legislature. Legislation (HB 2902) that would carry out this policy was defeated and a bill (SB 549) that mandated the Joint Legislative Committee on Trade and Economic Development to study a number of issues relating to log exports passed.

Central to the issue was the concept that the export of unprocessed logs to the foreign market was the equivalent to exporting jobs that would be available had the logs been processed into finished products in Oregon. The State of Oregon codified this concept in 1961 when it prohibited the export of timber off state lands that had not been "primarily processed" in the United States. Twenty years later an attempt was made to extend this concept to logs being exported off privately-owned lands by prohibiting parties who did so from bidding on state timber sales. The idea here was that persons who exported raw logs off privately-owned lands were "substituting" timber from public lands for their domestic marketing needs. A corollary to this was the belief that the increased profits generated by exporting raw logs enabled persons to bid higher prices for the state timber that they intended to "substitute" for private timber sold in the export market. This, in turn, was said to cause higher prices for public timber than would otherwise be the case and was preventing "smaller" mills (or at least those not involved in log exports) from obtaining sufficient logs at an economical price to keep operating. By preventing exporters of logs from private lands from bidding on public timber sales, the logic supporting the above arguments foresaw an increased availability of public timber through decreased bidding competition and a resultant increased supply of logs at lower prices to non-exporting log mills which in turn would generate more jobs for Oregonians.

The mandate of SB 549 to the Trade Committee was to conduct an interim study to "determine whether it is necessary or in the best interest of the State of Oregon to declare those persons . . . which export timber harvested on privately owned lands in log form to foreign markets ineligible to bid for or purchase forest products to be harvested on lands managed by the State Forester". The mandate included a number of sub-charges relating to "substitution", bidding practices, and the constitutional problems associated with the issues as follows:

a. Whether logs harvested on state lands are being substituted for logs harvested on private land which could have been primarily processed in the U.S. but are being exported to foreign markets.

b. The social, economic, employment and energy implications of preventing existing or potential substitution, including the cost and practicality of administering log substitution regulations.

c. Whether there are legal or constitutional problems concerning developing state policies on substitution of logs.

d. A review of the export of logs from privately owned lands and their impact on the public interest of the State of Oregon such as jobs and total revenue for the State of Oregon.

e. A review of the policy of the State of Oregon that allows open market bidding for timber managed by the State Forester, to determine whether the public interest is served in providing unrestricted competition, by considering impacts on jobs and total revenue to the state, counties, and school districts.

Because of events early in the interim which called into question the constitutionality of the basic legislation prohibiting log exports off state lands, that issue will be dealt with first. Following that, empirical data based on log mill surveys and state forest sales will be analyzed in order to provide a basis for consideration of the policy questions before the 1983 Legislature.

THE DATA BASE

Following the close of the 1981 Legislative Session, several hearings were held by the Trade Committee at which both opponents and proponents of a log export ban presented testimony. In addition, witnesses from state and federal agencies concerned with timber were heard. A complete listing of the testimony and materials submitted are contained in the appendix.

In an attempt to resolve some of the conflicting claims put forward by interested parties as well as to identify data relevant to the questions in the study mandate, two sources of primary data were developed. The first was a survey questionnaire sent to all log mills in western Oregon. Since the questions in the study mandate dealt with the impact of log exports on state forest bidding and since the five major blocks of state forest land on which timber sales occurred are all located in western Oregon, log mills east of the Cascades were not surveyed.

Most of the mills east of the Cascades purchase timber from federal forests.

The questionnaire (see copy in appendix) was developed with the cooperation of industry representatives and was designed to elicit information regarding operating characteristics, capital investment, and source of timber supply. The questionnaire was reviewed and approved by the Subcommittee on Log Exports before being sent out.

On February 19, 1982, 166 surveys were mailed to mills compiled from the 1981 Annual Lumber Review and Buyers Guide, a publication of the Western Wood Products Association. By June, 139 questionnaires had been returned for an 84 percent response. Of the non-respondents, most had ceased operations and shut down. Only five companies, with Boise Cascade being the largest, refused to cooperate with the survey. Results from the survey were compiled, coded, and entered into the OLIS computer.

The other major source of data involved state timber sales. Sales data from 1,152 timber sales from 1971 to 1981 was compiled, logged, and entered into the OLIS computer. Relevant portions of data from both of these primary sources are referred to in the following text where appropriate.

PART I: THE LEGAL ISSUE

Introduction

Twenty years earlier, in response to many of the same arguments presented to the 1981 Legislature regarding log exports, the 1961 Legislature passed HB 1663, requiring that all timber (except white cedar) sold by the State, or any of its political subdivisions, be primarily processed in this country. This legislation allowed timber from state lands to be exported in log form if a permit was obtained from the State Forestry Department. Conditions for granting the permit were specific and very stringent, requiring the applicant to demonstrate that he could not sell the logs domestically at a profit in relation to the appraised price for the logs. In 20 years under this law, only 12 applications were received. Of these, only four permits were granted, resulting in the export of approximately 1.8 million board feet of timber.

A. Argument Against Log Export Ban

1. The U.S. Constitution

The Attorney General in 1961, Robery Y. Thornton, was consulted regarding the constitutionality of the proposed law and informed the inquiring legislator that the proposed legislation was contrary to Article I, Sec. 8, clause 3, of the Constitution of the United States. This clause provides:

"The Congress shall have power . . . to regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

Attorney General Thornton concluded that "the proposed statute now under consideration occupies the position of imposing a burden upon foreign commerce and thus encroaches

upon the exclusive power of Congress". AG Opinion No. 5203, April 18, 1961. (See appendix for complete text.) Nonetheless, the Legislature passed HB 1663 and the Governor signed it into law.

Surprisingly enough, no court challenge has ever been made on the law restricting log export off state lands. Even though only 4 permits allowing log exports had been granted in 20 years, the 1981 Legislature deleted this provision of ORS 526.805-.835 (SB 549) and mandated a study of the issue.

At a very early point in the study (December 21, 1981), Representative Ted Bugas submitted a series of questions regarding the log export issue to the Attorney General (See Appendix). The first question dealt with the potential violation of federal or state constitution of the law prohibiting the export of unprocessed logs off state timber lands. The other questions dealt with the substitution issue.

In responding to this query, Attorney General Dave Frohn-mayer dealt only with the first question pertaining to existing state law restricting the export of unprocessed logs grown in Oregon on land owned by the State. Attorney General Frohn-mayer concluded that the law was "probably unconstitutional" and did not consider the additional questions regarding "no substitution" clauses because "if ORS 528.805 falls, these too would fall with it". (See Appendix for copy of AG opinion OP-5216, dated February 19, 1982.)

The following excerpts from the AG letter-opinion, with cited cases omitted, illustrate the reasoning behind the opinion of unconstitutionality:

"The state cannot under any circumstances enact a law forbidding export of unprocessed timber generally, or of any product of Oregon, without being in clear violation of the Foreign Commerce Clause of the United States Constitution

...

It was clearly established that this power is exclusive and that the states cannot directly regulate interstate and foreign commerce *as such* except to the extent that Congress has granted permission . . . If a state statute is for a legitimate state end such as the enhancement of public health, safety, security, or conservation, and it does not unduly restrict interstate commerce (a balancing test), it is valid . . .

However, this analysis first requires the establishment of a legitimate state interest in the regulation. If such an interest does not exist, the state regulation is invalid, and attempts by states to interfere with interstate commerce for economic reasons are virtually *per se* invalid . . .

In a closely analogous case, a Louisiana statute made it unlawful to export shrimp caught in Louisiana waters without the heads and hulls removed, *i.e.*, "primarily processed". The real purpose, held the court, was to protect Louisiana processors, but even given the stated statutory purpose to satisfy local demands:

" . . . A state is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state." *Foster-Fountain Packing Co. v. Haydel*, 278 US 1, 10 (1928)

In spite of the cited U.S. Supreme Court case law upholding the supremacy of the Federal Commerce Clause over state attempts to control local economic resources, the Attorney General was reluctant to reach a conclusive opinion pending the outcome of a similar Alaska case now on appeal to the U.S. Court of Appeals for the Ninth Circuit (Case No. 81-2081).

In *South-Central Timber Development, Inc. v. LaResche*, 511 F Supp 139 (D Alaska 1981) the district court held that an Alaskan statute requiring primary manufacture in the state of timber sold by the state was an unconstitutional infringement upon interstate and foreign commerce.

After saying the Alaska case would "probably be dispositive of most of the issues raised" in Oregon, the Attorney General went on to say that the only difference between the two was that the Alaskan law required primary manufacture in the state while Oregon permits primary manufacture in other states. "It is only foreign export for primary manufacture that is prohibited" but:

"This distinction does make a difference, in our opinion . . . if protection of a state's lumber manufacturing industry is not a valid basis for prohibiting export to other states or countries, protection of American lumber manufacturing industry is certainly beyond Oregon's power. It is reserved by the Commerce Clause to the United States."

Attorney General Frohnmayer also addressed the leading U.S. Supreme Court case relied upon in the proponents brief.

In *Reeves, Inc. v. Stake, supra*, 447 US 429, a 5-4 majority of the court upheld the right of the state of South Dakota to sell cement produced by a state-owned plant only to residents, during a period when demand exceeded supply. This policy clearly burdened interstate commerce. As proprietor of a cement manufacturing plant, the state had the right to limit the benefits of the investment of its citizens to those same citizens.

The majority emphasized the state's investment in manufacturing facilities, and very pointedly stated: "Cement is not a natural resource, like coal, timber, wild game, or minerals". . . . It went on to point out that South Dakota did not seek to limit sales of limestone—necessary to manufacture cement—to South Dakota residents. Nor did South Dakota prohibit resident purchasers of cement from using that cement out of the state, or from immediately reselling to out-of-state purchasers.

The AG concluded his opinion by saying "we have just informed the State Forester that no export permit can be issued under former ORS 526.815 for export of logs cut under a contract predating repeal of that statute. If, as we believe in all probability, ORS 522.805 is unconstitutional, the purchaser is free to export the logs without a permit".

2. The Oregon Constitution

In addition to the Federal Constitution, a potential ban on log exports must also survive a test of the Oregon Constitution. Since approximately 110,000 acres (mostly in the Elliott State Forest) of a total of 735,000 acres of state timber belong to the Common School Fund, Article VIII, Section 2, of the Oregon Constitution must be taken into account. This provision provides as follows:

"(1) The sources of the Common School Fund are:

"(a) The proceeds of all lands granted to this state *for education purposes* except the lands granted to aid in the establishment of institutions of higher education under the Acts of February 14, 1859(11 Stat 383) and July 2, 1862(12 Stat 503)."

...

"(2) *All revenues derived from the sources mentioned in subsection (1) of this section shall become a part of the Common School Fund. The State Land Board may expend moneys in the Common School Fund to carry out its powers and duties under subsection (2) of section 5 of this Article. Unexpended moneys in the Common School Fund shall be invested as the Legislative Assembly shall provide by law. Interest derived from the investment of the Common School Fund shall be applied to the support of primary and secondary education as provided under section 4 of this Article.*" (emphasis supplied)

The reference in the above quoted section of the Constitution referring to the "proceeds of all lands granted to the state for educational purposes" pertains to the Act of Congress admitting Oregon into the union, 11 Stat 383 (1859).

That Act provides in part:

Section 4 . . . *That the following propositions be, and the same are hereby, affected to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the State of Oregon, to-wit: first, that sections numbered sixteen and thirty-six in every township of public lands in said State, . . . shall be granted to said state for the use of schools . . .*" (emphasis supplied)

In 1975, responding to a question regarding proposed legislation requiring the State Forester to set aside certain state timber sales for exclusive bidding by small business concerns, Attorney General Lee Johnson said the above quoted provisions of the Oregon Constitution created a trust which requires the state receive full monetary value for the sale, rental or other use of its trust lands. The trust, said the AG:

" . . . would prohibit the legislature from authorizing the state to sell timber from its Common School Forest Lands for a price per 1,000 board feet less than the prevailing market price. Stated differently, . . . the legislature cannot validly utilize the Common School Forest Lands to subsidize small businesses in the timber industry by allowing small businesses to purchase timber at set-aside sales for a price less than the competitive price achievable in an open market with competitive bidding. (574 OR. AG. Opinion 7170, May 22, 1975)

Attorney General Frohnmayer, in his February 19, 1982 letter-opinion, went beyond the interpretation that the Common School Trust Fund requires that revenues be maximized by saying the legislature cannot tell the State Land Board how to manage these trust lands:

. . . As applied to constitutional Common School Fund lands, the legislature does *not* have authority to act as owner. The State Land Board has that authority. If applied to those lands, and if so doing would impair the ability of the State Land Board to sell timber on the most advantageous terms, ORS 526.805 and 526.835 would impair the authority of the Land Board to manage. We therefore unequivocally state that these statutes cannot constitutionally be applied to sale of logs from constitutional Common School Fund lands, if the Land Board finds that sale for export would be a proper management decision. (p. 7. OR. AG. opinion, February 19, 1982)

Both these interpretations are relevant to the proposed log export ban. On the one hand, according to former AG Thornton, any diminution of revenues from common school lands would violate the State constitution. As shall be seen in Part III, prohibiting those companies who export logs off their

private lands from bidding on common school timber sales may well result in decreased revenues to the state. On the other hand, according to present AG Frohnmayer, given the constitutional derivation of the State Land Board's authority to manage common school lands, the legislature has no authority to interfere with the Board's management prerogative.

B. Proponents Argument In Favor Of Log Export Ban

1. The U.S. Constitution

The proponents of a log export ban disagree with Attorney General Frohnmayer's interpretation of how the courts would receive such a ban. They say it is "probable" that Oregon's log export policy is constitutional under current Supreme Court caselaw insofar as an interstate commerce challenge is raised. In materials submitted on hearings on HB 2902 (see appendix) they argue that "with respect to the requirement that the state law not interfere with needed federal uniformity, it will be argued that Oregon's policy merely mirrors current (and long-standing) federal policy with respect to logs cut from federally-owned lands." They argue that three recent U.S. Supreme Court cases dealing with facts similar to those at hand have established that the usual rules prohibiting states from discriminating against interstate commerce do not apply when the state is dealing with its own tax dollars or making decisions respecting state owned goods (as opposed to privately-owned goods). In a 1972 case (*American Yearbook Co. v. Askew*, 339 F. Supp. 719 (Md Fla. 1972), affd. mem., 409 US 904) the U.S. Supreme Court upheld the validity of a Florida law requiring that the printing needs of the State of Florida be satisfied by using Florida printers. In a 1976 case (*Hughes v. Alexandria Scrap Corp.*, 426 US 794) the same Court sustained the validity of a Maryland program aimed at clearing the state's roads of auto hulks, even though out-of-state auto scappers were discriminated against in the program. A 1980 case, *Reeves, Inc. v. Stake*, (447 US 429), is similar to the Oregon situation.

In *Reeves*, the State of South Dakota was challenged by a Wyoming concrete distributor. South Dakota, in response to regional cement shortages, built a cement plant in 1919, and it has operated it since then. Since at least 1974, South Dakota has followed a policy of limiting the sales from the plant to South Dakota residents in times of cement shortages. Reeves sued the state when, in 1978, the state refused to sell concrete to the firm, pursuant to its allocation policy. The United States Supreme Court upheld South Dakota's policy of preferring its own residents. The Court characterized South Dakota as a market participant and said:

The basic distinction drawn from *Alexandria Scrap* [the 1976 case noted above] between States as market participants and States as market regulators makes good sense and sound law. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

The Court went on to say:

Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as the guardian and trustee for its people", . . . , and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

Responding to Reeves' complaint that South Dakota's preference for its own residents was protectionist, the Court commented:

The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the state was created to serve.

The proponents of a log export ban argue that the parallels between the facts of *Reeves* and the facts relevant to a consideration of the constitutionality of Oregon's log export policy are obvious. First, in both cases the State is placing limitations on the sale of property that is owned by the State. In both

instances, the property is in existence only because of the investment of significant amounts of tax dollars. Lastly, in both instances the legislatures have chosen to limit one important benefit of a program funded from state tax funds to the citizens of the State who supplied those tax dollars.

The proponents of a log export ban recognize that such a ban is a discrimination against foreign commerce under the federal constitution but argue that Oregon's log export policy is fully consistent with the long-standing federal policy that the products of the national forests are to be used to satisfy the nation's domestic needs.

They say the fundamental policy that the national forests were established for the benefit of the citizens of the United States was clearly stated in the Organic Administration Act of 1897 and carried forward even more explicitly in the Sustained Yield Forest Management Act of 1944. That Act recognized that there is a national interest in preserving the economic stability of communities economically dependent on the neighboring national forests. As one expression of that general policy, federal statutes have, since 1897, banned or limited severely the export of logs cut from federal lands.

The proponents say that despite this clear statutory expression of Congressional policy, a concern during the 1960's for this country's balance of payments difficulties led the Executive Department to permit large-scale exporting of logs cut from federally-owned lands. Following extensive legislative hearings on the problems created by this Executive Department policy, Senator Wayne Morse co-sponsored (along with Senator Mark Hatfield and other western senators) the so-called Morse Amendment. The Morse Amendment, approved by the Congress in 1968, limited the volume of logs cut from federal lands that could be exported.

The Morse Amendment was added to a bill that had originated in the House of Representatives. The Conference Committee report on the bill responded to the questions raised

about the possible impact of the log export limitations on this nation's foreign affairs as follows:

Before the limitation expires, there will be ample opportunity for the Committee on Foreign Affairs to observe its impact on our relations with other nations and for those committees of the Congress more directly concerned with U.S. forest industries to evaluate its effect on the economy of the United States. 1968 U.S. Code Cong & Ad News 3980

When the Morse Amendment expired in 1971, its provisions were extended for a two-year period. When this extension expired in 1973, Congress attached a similar restriction as a rider to the Department of the Interior and Related Agencies Appropriation Act, 1974. Congress has renewed this limitation on log exports off federal lands every year since 1973 and is expected to do so again before the end of this fall session.

From this series of extensions restricting log exports, the proponents of a log export ban argue that Congress has clearly concluded that any foreign affairs impact is of less concern than the adverse impact on community stability caused by a policy of unlimited log exports. Timber cut from lands owned by the State of Oregon constitutes (in 1975) only 2.2% of the total timber harvest in Oregon (as compared to timber cut from federal lands, which constitutes 44.8% (again in 1975) of the total harvest in Oregon). From this, the proponents of a log export ban argue that:

It seems highly unlikely, given the long-standing federal policy governing log exports of logs cut from federal lands, and given the relatively small portion of the total Oregon timber harvest that comes from lands owned by the State of Oregon, that Congress would disapprove of Oregon's log export policy. Oregon's policy is consistent with federal policy and does not operate to "impair federal uniformity in an area where federal uniformity is essential." Thus, it is probable that the Supreme Court would hold that Oregon's log export policy survives a Foreign Commerce challenge.

2. The Oregon Constitution

The proponents of a log export ban argue that the mandate of Article VIII of the Oregon Constitution is "significantly broader than maximizing the cash income to the Common School Fund" (see Appendix for proponents brief). They quote Section 5(2) which states the basic policy: the State Land Board shall follow:

(2) The board shall manage lands under its jurisdiction with the object of *obtaining the greatest benefit for the people of this state*, consistent with the conservation of this resource under sound techniques of land management. (emphasis added)

The proponents cite the official explanation of the Voter's Pamphlet when Section 5(2) was added to Article VIII in 1968. This language makes it clear that the purpose of this addition was to broaden the State Land Board's management powers:

. . . In managing these (State) lands, the Board is now restricted to a single objective—to maximize its cash income. It cannot spend for fencing, seeding or rangeland or improvements of its lands generally, even though such improvements could enhance its income in the long run. The Board normally cannot set aside land for public recreation, parks or scenic purposes.

The proposed amendment will remove this strict cash income objective, permitting land uses varying with the location, type of land and needs of the citizens of the state. In addition, it will permit the Board to spend monies from the Common School Fund on worthwhile land improvements. . . . May 28, 1968 Voter's Pamphlet at 4 (emphasis added)

The proponents also cite the broad management authority over common school forest lands by the Legislature to the State Forester (ORS 530.490(1) and 530.500) as evidence that these lands are to be managed for the "greatest benefit of the people of this state" rather than for maximizing their cash income.

The proponents further look to the wording of the Oregon Admission Act which granted public lands to the State "for the

use of Schools." They say there is no apparent reason why the above phrase ought to be interpreted to mean "producing the greatest cash income to the Common School Fund." They say if State-owned forest lands are managed so as to protect jobs for local residents, a number of financial benefits to schools are likely to result:

- 1) The person employed in the mills will pay income taxes into the General Fund of Oregon (a significant portion of which is returned to schools in the form of Basic School Support). The mill owners, as well, will be paying income taxes.

Both employees and mill owners will have the income needed to pay property taxes (a large portion of which goes to the support of local schools).

They also say that policies that contribute to the continued economic health of those local mills most likely to bid for logs from State lands in the future will, in the long run, maximize the return to the Common School Fund (on the theory that diminished bidding competition resulting from the bankruptcies of local mills will lead to lower bids in the future.)

For these reasons, the proponents of a log export ban conclude that such a ban would survive a State constitutional challenge.

CONCLUSION

The day after this report was given to the full committee, it was learned that the 9th Circuit Court of Appeals had rendered its decision in *South-Central Timber Development, Inc. v. Le Resche*, 511 F Supp 139 (D Alaska 1981). This was the case Attorney General Frohnmayer had said would "probably be dispositive of most of the issues raised" in the Oregon log export issue. Although the Appeals Court decision reversed the District Court's decision, and thus upheld the Alaska law requiring logs off state lands to be primarily processed in Alaska, it probably will *not* be dispositive of the issues raised in Oregon for reasons developed below.

In reversing the District Court, the Appeals Court appears to break new Constitutional ground by saying, "We conclude there is *implicit approval* of the Alaska statute *under congressional statutes which impose similar conditions* on the sale of timber from federal lands" (emphasis added). In developing its novel "implicit congressional approval" doctrine for upholding the state statute, the Appeals Court first paid homage to the Commerce Clause by saying that state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case. The Court then said that "despite the force of this rule, there are narrow exceptions, as in the case of a state proprietary activity" and cited the *Reeves* case, depended upon by the proponents of an export ban in the Oregon log export issue and by the State of Alaska in its appeal brief. However, the Court said:

We need not reach the question, however. This is not a case where the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy.

The Court said that Congress can confer upon the States an ability to restrict the flow of interstate commerce but such express authorization is not always necessary "... where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests."

The Court said "the federal government has consistently endorsed restrictions on the interstate shipment of timber to protect the local processing capability of isolated areas, evincing a general federal policy of promoting geographic dispersion in the timber industry". The Court then traced federal log export restrictions from the Organic Administration Act of 1897 to the "Morse Amendments" of 1973. It concluded the opinion by saying:

"When Alaska was admitted to statehood in 1959 and received title to a large portion of the territory's public

lands, it contrived to adhere, with limited exceptions, to preexisting federal policy. . . . The state's primary manufacture requirements duplicate those imposed on federal timber and serve the same objective, that of promoting industrial developments in isolated areas Its purpose was to protect local processors from the resulting slack in demand for their services caused by the temporary suspension of federal timber sales from national forests in Alaska. The state's decision could not have been more in keeping with federal timber policy. In these circumstances, we find ample congressional acquiescence in Alaska's primary manufacture requirements".

Preliminary Analysis:

There are two aspects of this decision which may cause the U.S. Supreme Court to review it (a process which could require another 1-3 years). The first is the "implicit congressional approval" doctrine which has never been enunciated by the U.S. Supreme Court. The Court could as easily find that Congress has repeatedly decided *not* to restrict the export of logs from timber on *non-federal owned lands* as it could the "implicit" extension of the ban off federal lands.

Second, the Appeals Court cast its decision in terms of federal policy "promoting industrial developments in isolated areas" and to "protect the local processing capability of isolated areas, evincing a general federal policy of promoting geographic dispersion in the timber industry". While opinion may differ, Oregon hardly qualifies as an "isolated area" in which it is necessary to promote "geographic dispersion" in the timber industry.

The anti-substitution clauses advocated by the proponents of a log export ban in Oregon penalize companies exporting logs off private lands in foreign commerce. This would appear to make it a very different factual situation from the Alaskan case but, again, predicting how a court will hold on this issue, is akin to studying sheeps' entrails for a sign of the future. The Appeals Court holding appears to reaffirm this observation.

In a letter to the State Forester dated December 14, 1982 (See appendix) Attorney General Frohnmayer stated that given the Ninth Circuit decision "there is no present basis upon which to conclude that the courts would find the Oregon statutes to be invalid". He also said "the [forestry] department therefore *may* but is *not required* to insert a provision in its contracts requiring primary processing in the U.S. or otherwise referring to ORS 526.805 and 526.835". The AG said it would be appropriate for the department to report any known violations of these statutes to the local district attorney. He also reiterated his opinion that the export ban does *not* apply to Common Fund lands.

No. 82-1608

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FILED

NOV 25 1982

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

v.

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.,*
Respondents,

v.

KENAI LUMBER CO., INC.,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 30, 1983
CERTIORARI GRANTED OCTOBER 11, 1982

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**CHRONOLOGICAL LIST OF RELEVANT
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JOINT APPENDIX

Chronological List of Relevant Docket Entries

1980

- Oct. 16—Complaint of South-Central Timber Development, Inc. filed. Motions of South-Central Timber Development for Preliminary Injunction and Temporary Restraining Order filed. Memorandum of Law of South-Central Timber Development in Support of Injunctive Relief filed. Plaintiff's Affidavits of Clyde Tanaka and James N. Wanamaker filed. Oral Argument on Motion by South-Central Timber Development for TRO set for Oct. 20, 1980.
- Oct. 20—Opposition of Defendants (Robert LeResche, Geoffrey Haynes, Theodore Smith) to Motion by South-Central Timber Development for TRO filed. Defendants' Affidavit of David Wallingford filed. Plaintiff's Supplemental Affidavit of James N. Wanamaker filed. Memorandum of Law by South-Central Timber Development in Reply to Opposition by LeResche, *et al.* to Motions for Injunctive Relief filed. Court Minutes re Oral Argument on Motion for TRO filed—Decision Reserved.
- Oct. 21—Memorandum and TRO Restraining State from Conducting Icy Cape No. 2 Timber Sale Scheduled for Oct. 23, 1980 filed. Order filed Setting Preliminary Pretrial Conference.
- Oct. 31—Motion by Kenai Lumber Co., Inc. to Intervene as Defendant filed.
- Nov. 14—Stipulation filed that Parties do not Oppose Motion for Intervention by Kenai Lumber.
- Nov. 18—Memorandum and Order Allowing Kenai Lumber to Intervene as Defendant filed. Motion by Kenai Lumber to Dismiss and Memorandum in Support filed. Brief by Kenai Lumber on Constitutionality of Primary Manufacture filed. Motion by South-Central Timber Development for Summary Judgment filed. Plaintiff's Affidavit of H. Sugiyama filed.

Nov. 19—Motion by LeResche, *et al.* for Summary Judgment and Memorandum in Support filed.

Dec. 3—Opposition by Kenai Lumber to Motion by South-Central Timber Development for Summary Judgment and Memorandum in Support of Motion by LeResche, *et al.* for Summary Judgment filed. Reply by South-Central Timber Development to Memorandum of Law by LeResche, *et al.* in Support of Its Cross-Motion for Summary Judgment filed. Plaintiff's Supplemental Affidavit of H. Sugiyama filed.

Dec. 5—Reply Memorandum by State in Support of Motion for Summary Judgment and in Opposition to Motion of South-Central Timber Development for Summary Judgment filed.

1981

Jan. 5—District Court's Memorandum and Order Granting Motion by South-Central Timber Development for Summary Judgment filed; Motion by LeResche, *et al.* for Summary Judgment denied; Motion by Kenai Lumber to Dismiss denied.

Jan 9.—Final Judgment of the District Court Permanently Enjoining Alaska From Requiring Primary Manufacture of State-Owned Timber, dated Jan. 6, 1981, filed.

Jan. 15—Notice of Appeal by LeResche, *et al.*, filed.

Jan. 20—Case No. 81-3053 docketed and Appearances of Counsel entered.

Jan. 23—Notice of Appeal by Kenai Lumber filed.

Jan. 27—Statement of Issues by Appellant filed.

Feb. 2—Case No. 81-3081 docketed and Appearance of Counsel entered.

Feb. 24—Stipulation and Order Consolidating Appeals No. 81-3053 and No. 81-3081 filed.

Mar. 4—Copy of Ninth Circuit Order Consolidating Appeals No. 81-3052 and No. 81-3081 filed.

April 21—Brief and Excerpts of Record by Kenai Lumber filed.

May 20—Motion for Leave to File and Brief of Amicus Curiae by Association of Western Pulp and Paper Workers and its Affiliated Ward Cove, Alaska Local 783 and of International Woodworkers of America, AFL-CIO, Western States Regional Council No. 3 and its Affiliated Alaska Local 3-193 filed.

June 3—Order filed Granting Leave to File Amicus Brief to Association of Western Pulp and Paper Workers and its Affiliated Ward Cove, Alaska Local 783 and the International Woodworkers of America, AFL-CIO, Western States Regional Council No. 3 and its Affiliated Alaska Local 3-193. Brief, heretofore received, ordered filed.

June 11—Brief of State of Alaska filed. Excerpts of Record, filed by Kenai Lumber Co, adopted.

June 23—Brief of South-Central Timber Development filed.

July 16—Reply Brief of Appellant Kenai Lumber filed.

July 21—Reply Brief of Appellant State of Alaska filed.

Dec. 10—Appeal argued and submitted before Goodwin, Kennedy, and Skopil.

1982

Dec. 1—Ninth Circuit Court ordered Opinion (Kennedy) reversing District Court Opinion filed and Judgment to be filed and entered.

1983

Feb. 3—Ninth Circuit Order awarding Kenai Lumber Co. costs in amount of \$352.00 filed.

Feb. 15—Ninth Circuit Mandate issued and amended to include costs.

COMPLAINT (FILED OCT. 16, 1980)

WANAMAKER, DEVEAUX & CRABTREE
A Professional Corporation
909 W. 9th Ave., #140
Anchorage, Alaska 99501
(907) 279-6591

Attorneys for Plaintiff
SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and

THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,

Defendants.

FILED
OCT 16 1980
United States District Court
District of Alaska
By DC Deputy

COMPLAINT

COMES NOW the Plaintiff, SOUTH-CENTRAL TIMBER DEVELOPMENT, INC. (hereinafter "SOUTH-CENTRAL TIMBER"), by and through its attorneys of record WANAMAKER, DEVEAUX & CRABTREE, APC, and alleges as follows:

JURISDICTION

1. This action arises under the Constitution of the United States, Article I, § 8, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000, and, therefore, jurisdiction lies under 28 U.S.C. § 1331(a). Insofar as this Complaint seeks Declaratory Judgment, it is based on 28 U.S.C.A. 2201 and Rule 57 Federal Rules of Civil Procedure.

2. Plaintiff now is, and since July 18, 1967, has been a domestic corporation, duly organized and existing under the laws of the State of Alaska, engaged in the business, among other things, of purchasing standing timber in the State of Alaska, logging or contracting for the logging of such timber, and shipping the resulting logs from Alaska and into foreign commerce. Plaintiff's corporate offices are located at Anchorage, Alaska, and it has timber processing facilities at Icy Bay, Alaska (near Cape Yakataga), and Jakalof Bay, Alaska (near Homer). Plaintiff has paid its Alaska and United States corporate taxes last due and filed its Alaska corporate report last due.

3. Defendant ROBERT LERESCHE is Commissioner of the Department of Natural Resources, State of Alaska. Pursuant to AS 38.05.115, the Commissioner

"upon recommendation of the director, shall determine the timber and other materials to be sold, and the limitations, conditions and terms of sale."

4. Defendant GEOFFREY HAYNES is the Deputy Commissioner of the Department of Natural Resources, State of Alaska. GEOFFREY HAYNES is also the Director of the Division of

Lands of the Department of Natural Resources, State of Alaska. Defendant HAYNES, therefore, has authority to recommend terms and conditions of Alaska timber sales and to conduct such timber sales. Some of the functions which said Defendant GEOFFREY HAYNES would otherwise exercise in his capacity of Director of the Division of Lands have been delegated to THEODORE G. SMITH, the Director of the Division of Forest, Land and Water Management of the Department of Natural Resources of the State of Alaska, pursuant to written delegations, a copy of which is attached as Exhibit A.

5. Defendant THEODORE G. SMITH is the Director of the Division of Forest, Land and Water Management of the Department of Natural Resources of the State of Alaska. Pursuant to AS 38.05.110, *et seq.*, and the delegations of authority attached as Exhibit A, and certain administrative regulations, specifically 11 AAC 76.005, *et seq.*, he is the state official having authority and responsibility, subject to the approval by Defendant LERESCHE, to recommend timber sales and terms of sale, and to conduct competitive timber sales.

6. AS 38.05.120 declares that any violation of Title 38 of the Alaska Statutes, or any terms of a contract for the sale of timber, subjects the violator to appropriate legal action. 11 AAC 76.175 likewise provides that if the purchaser of a timber sale breaches any of the provisions of the contract, then "the director may terminate the contract and all timber or forest products for which title has not passed shall vest in the state. . . ."

7. The Defendants have advertised a notice of sale for a sale of approximately 49,185,000 board feet of timber in the area of Icy Cape, Alaska. This proposed sale, which is known as the Icy Cape No. 2 Timber Sale, is scheduled to be sold at public auction on October 23, 1980, at 2:00 o'clock p.m.

8. The notice of said Icy Cape No. 2 Timber Sale provides as follows:

"Primary manufacture within the State of Alaska will be required as a special provision of the contract."

9. Both versions of the Prospectus for said Icy Cape No. 2 Timber Sale provide as follows:

"Primary manufacturer.

Primary manufacture shall be as defined under Section 11 AAC 76.130 of the "Timber Sales Regulations" and as further defined in the Governor's "Policy Statement on Primary Manufacture" dated May 7, 1974."

10. The Timber Sale Contract, which the Defendants have developed for use on the Icy Cape No. 2 Timber Sale, and which the successful bidder will be required to sign, provides as follows:

"Section 68. Primary Manufacture. Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974. For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in waste.

Chips are considered to have received primary manufacture."

11. The primary manufacture regulation 11 AAC 76.130 provides as follows:

"11 AAC 76.130. PRIMARY MANUFACTURE.

(a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent

that the residual cants, slabs or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture."

12. The document attached as Exhibit B is a correct copy of the Governor's Policy Statement on Primary Manufacture dated May 7, 1974.

13. Plaintiff SOUTH-CENTRAL TIMBER is actively engaged in timber operations in the State of Alaska. Plaintiff is, in fact, actively logging the State of Alaska Icy Cape No. 1 Timber Sale, which is immediately adjacent to the proposed Icy Cape No. 2 Timber Sale. Primary manufacture is not required of logs removed from the Icy Cape No. 1 Timber Sale.

14. Plaintiff SOUTH-CENTRAL TIMBER would like to bid on the Icy Cape No. 2 Timber Sale. However, SOUTH-CENTRAL TIMBER no longer has a mill capable of processing this volume of timber into cants, its mill having been effectively closed by the need to comply with State of Alaska air pollution requirements. Accordingly, SOUTH-CENTRAL TIMBER is placed at a serious disadvantage in bidding in that, since it does not have a mill of its own, it would have to take into account the added costs of making cants in the mill of another company within the working circle of this sale. Unless the unconstitutional requirement of primary manufacture is removed by this Court, such added costs will effectively remove SOUTH-CENTRAL TIMBER from the bidding on this sale.

15. The primary manufacture requirement 11 AAC 76.130 is illegal and should be enjoined for the following reasons:

(A) It violates Article I, § 8, of the Constitution of the United States of America for the following reasons:

(1) It is a *per se* violation of the Commerce Clause of the United States Constitution and is contrary to the doctrine as established in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *West v. Kansas Nat. Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and *Hicklin v. Orbeck*, 437 U.S. 518 (1978);

(2) The regulation is an illegal attempt by the Defendants to prefer the citizens of the State of Alaska in the utilization of natural resources found within the State of Alaska but destined for interstate or foreign commerce;

(3) The primary manufacture requirement directly obstructs and discriminates against interstate and foreign commerce and the right to carry on such commerce.

(B) No action of the Alaska Legislature has authorized the adoption of such primary manufacture regulations.

(C) 11 AAC 76.130 is unconstitutionally vague.

16. Plaintiff alleges that there has been no legislative authorization for the adoption of the regulation 11 AAC 76.130.

17. Plaintiff alleges that 11 AAC 76.130 is unconstitutionally vague and its enforcement as a timber sale provision should be enjoined.

18. Plaintiff alleges that the Governor's Policy Statement on Primary Manufacture, dated May 7, 1974, does not have the force and effect of law, and may not be utilized either as a legal requirement of Alaska timber sales or an interpretive aid to 11 AAC 76.130.

19. Plaintiff alleges that the terms of sale for Icy Cape No. 2 Timber Sale were changed during the advertising period.

The first Prospectus provided by the STATE OF ALASKA stated:

"Method of Payment

The bid deposit will be credited to the stumpage deposit at the time of signing of the contract by the purchaser. The State will refund the excess bid deposit to the Purchaser at that time.

Prior to cutting of any timber under this contract, the purchaser will deposit with the State an advance stumpage deposit equal to the value of timber estimated to be cut in not less than 30 calendar dauys [sic] nor more than 60 calendar days."

The second Prospectus provided by the STATE OF ALASKA stated:

"Method of Payment

Purchaser shall furnish a payment bond in the amount of \$250,000.00. When the payment bond has been furnished to the State the bid deposit will be refunded.

Purchaser shall submit stumpage payments and scale reports to the State on the 10th of each month for the previous months cutting."

The difference between the two Prospectuses is as follows:

Prospectus	Amount of Cash Money Which Can Be Retained By State
Version #1	Up to \$836,000
Version #2	Apparently none if a \$250,000 payment bond is provided.

Plaintiff is genuinely confused as to which is the legal requirement for this sale. If Version #1 is controlling, it will mean an increased cost of approximately \$140,000 per year, assuming borrowing at 17 to 18 percent interest.

20. The Defendants have performed or adopted an appraisal which does not accurately appraise stumpage value in that it

contains a gross error in the computation of transportation costs; it being a practical impossibility to raft logs from Icy Cape No. 2 through the Gulf of Alaska, and in fact logs must be transported by barge at a higher cost. Said higher cost would indicate transportation costs of approximately \$55 per thousand board feet greater than appraised.

21. The contract for said Icy Cape No. 2 Timber Sale provides for stumpage reappraisal in February 1981 and each February thereafter. The Defendants have not indicated in official sale documents how or if such appraisal mistake as noted in paragraph 20 above will be corrected. Accordingly, potential bidders are left only speculation as to how stumpage will be determined.

22. This Icy Cape No. 2 Timber Sale is unique in that it will be the last opportunity for a substantial STATE timber sale in the Gulf of Alaska for many years to come for the reason that determinations have been made by the STATE that Icy Cape No. 2 Timber Sale will result in such a complete utilization of the allowable annual cut for the State forest lands that accordingly other timber sales will not be made in this area in the near future.

23. SOUTH-CENTRAL TIMBER has at the present time only one timber sale contract (the State of Alaska Icy Cape No. 1 Timber Sale) on which it is conducting logging operations. It is expected that this contract will be finished in two or three operating seasons. Unless SOUTH-CENTRAL TIMBER is permitted to bid on the Icy Cape No. 2 Timber Sale, it will face the prospect of having to cease logging operations by reason of the unavailability of timber. Thus, Plaintiff will suffer irreparable harm and injury unless the Icy Cape No. 2 Timber Sale is enjoined until such time as it is conducted in conformity with law.

24. Unless the Defendants are enjoined from holding the Icy Cape No. 2 Timber Sale until such time as they have removed the constitutional defect of requiring primary manufacture, and have renoticed the sale with legal terms, Plaintiff will be effectively eliminated from the bidding process.

25. Unless the Defendants are enjoined from holding the Icy Cape No. 2 Timber Sale until such time as they have removed the legal defects, in addition to the primary manufacture defect, Plaintiffs may be required to bid on a sale which has not been legally conducted and which can be voided at the instance of another bidder or other person having standing to sue.

26. Plaintiff further alleges that in the event that this sale is enjoined on grounds other than the illegality of primary manufacture, or the Defendants agree to reschedule the sale but have not eliminated the primary manufacture requirement, then in that event, this is an appropriate case for use of Declaratory Judgment and requests that this Court enter its Declaratory Judgment declaring the primary manufacture requirement 11 AAC 76.130 to be unconstitutional, illegal, and invalid, and that the State of Alaska may not legally convey timber within the Icy Cape No. 2 Timber Sale area until such time as that requirement is removed from the notice, prospectus, and contract of sale.

27. Further, Plaintiff alleges that it would be appropriate for this Court, after enjoining this sale until defects are corrected, to require Defendants to continue its proceedings for this sale and hold the sale with the primary manufacture requirement eliminated and other legal defects corrected, since to cancel the sale would be to punish SOUTH-CENTRAL TIMBER for insisting upon its constitutional rights.

WHEREFORE, the Plaintiff prays:

1. For preliminary and permanent injunction restraining the Defendants from conducting the Icy Cape No. 2 Timber Sale until such time as the requirement of primary manufacture has been eliminated from the notice, prospectus, and contract of sale, and other legal defects have been cured, and the sale has been properly noticed.

2. For a temporary restraining order, restraining the Defendants from conducting said Icy Cape No. 2 Timber Sale until this matter can be heard and determined.

3. That this Court enter Declaratory Judgment declaring 11 AAC 76.130 to be unconstitutional, illegal, and invalid.

4. That this Court require Defendants to continue the proceedings for the Icy Cape No. 2 Timber Sale and hold the sale with the primary manufacture requirement eliminated and other legal defects corrected, since to cancel the sale altogether would be to punish SOUTH-CENTRAL TIMBER for insisting upon its constitutional rights.

5. That the Plaintiff recover its costs and attorneys' fees herein.

6. For such other and further relief as the Court deems just and equitable in the premises.

RESPECTFULLY SUBMITTED this 15th day of October, 1980.

**SOUTH-CENTRAL TIMBER
DEVELOPMENT, INC.**

/s/By **H. Sugiyama**
H. SUGIYAMA
Vice President

WANAMAKER, DEVEAUX, & CRABTREE
A Professional Corporation

/s/By **LeRoy E. DeVeaux**
LEROY E. DEVEAUX

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

H. SUGIYAMA, being first duly sworn, deposes and says:

I am the Vice President of SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., and make this verification for and on behalf of said corporation; SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., is the Plaintiff named in the foregoing COMPLAINT; I have read the foregoing COMPLAINT and understand the contents thereof; I have executed it freely and voluntarily on behalf of

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., as Vice President for the purpose set forth therein; and the same is true of my own knowledge.

/s/ H. Sugiyama
H. SUGIYAMA

SUBSCRIBED and SWORN to before me this 15th day of October, 1980.

/s/ Anita M. Mowery
ANITA M. MOWERY
Notary Public for Alaska
My commission expires: 10/4/82

ANITA M. MOWERY
NOTARY PUBLIC
STATE OF ALASKA

MEMORANDUM**STATE OF ALASKA****TO: Division Directors****FROM: Jeff Haynes**
Deputy Commissioner**DATE: July 1, 1980****FILE NO: 81/001****TELEPHONE NO:****SUBJECT: DEPARTMENT ORDER 81/001**
Department Management System

The contents of this Department Order describe the management system for the Department of Natural Resources. All operations of the Department shall be consistent with this management system. The six components of the Department management system are:

- (1) Department Organization
- (2) Delegations of Authority
- (3) Project Budgeting/Monitoring/Accounting System
- (4) Regional Resource Plans
- (5) Department Orders
- (6) Directors' Meetings

I. DEPARTMENT ORGANIZATION

The Department of Natural Resources is arranged by function. There are five functions contained within the Department. The five functions, and corresponding entities, are:

Function	Entity
Executive Office	Commissioner Deputy Commissioner Special Assistants Boards/Advisory Committees
Resource Inventory/Assessment	Division of Geological and Geophysical Surveys
Resource Research	Division of Research and Development

Resource Management	Division of Forest, Land and Water Management
	Division of Agriculture
	Division of Minerals and Energy Management
	Division of Parks
Department Services	Division of Administration and Management
	Division of Technical Services

The more specific duties of these entities are set out below.

A. Executive Office

The Commissioner is the chief executive officer of the Department, and possesses final decisionmaking authority on all matters within the jurisdiction of the Department unless said authority has been subdelegated to subordinate officers. As a member of the Cabinet, he reports on behalf of the Department to the Governor, the Legislature, and the Judiciary on matters affecting the Department.

The Deputy Commissioner is the second executive officer of the Department and may act on behalf of the Commissioner on all matters consistent with instructions from the Commissioner. He is also responsible for general management of all operations of the Department.

Special Assistants report through the Deputy Commissioner to the Commissioner and perform staff functions as assigned. Special Assistants do not possess line decisionmaking authority unless specifically vested with that authority by the Commissioner or Deputy Commissioner after notification to affected Division Directors. If the Department is operating properly, there should be no occasion to vest Special Assistants with line decisionmaking authority.

Boards and Advisory Committees perform the functions established by the statutes creating them.

B. Resource Inventory/Assessment

The Division of Geological Surveys is responsible for performing the Resource Inventory/Assessment function for the Department. This function consists of gathering, assessing, and compiling information relating to surface and subsurface resources, including minerals, coal, oil and gas, geothermal energy, water, uranium, soils, geologic hazards, vegetation, soils, timber, general surficial and subsurficial features, and use and settlement. The finished product should be sufficient for the Division of Research and Development to formulate alternative courses of action for the Department to take respecting the natural resources in question, or for a particular division to carry out a Project already approved by the Department. Generally, the Projects performed by the Division of Geological and Geophysical Surveys will be generated through requests from the Commissioner or other Divisions within the Department based on foreseeable needs.

C. Resource Research

The Resource Research function is performed by the Division of Research and Development. On a standard resource development Project, the Division of Research and Development will translate inventory and assessment data provided by the Division of Geological and Geophysical Surveys into alternative courses of action for approval by the Commissioner. The Division of Research and Development is also the one inter-divisional division within the Department, performing Projects which affect two or more divisions and therefore require a clearinghouse process. Under the Resource Research function, the Division of Research and Development performs six subfunctions:

- (1) Development of a data processing network (ALARS) which will serve the requirements of various other divisions, at least to the point that a particular system is operational. At that stage, a decision will be made as to whether the system is retained by the Division or moved to the supervising authority of another division.

- (2) Operation of a Departmental clearinghouse covering A-95 referrals, coastal management procedures, mat-

ters referred by the Commissioner or other agencies, legislation, and similar items. The purpose is to establish one entity which assimilates materials and positions from various divisions, synthesizes a common position with the consent of affected divisions, and refers appropriate matters to the Commissioner for decision.

(3) Development of regional resource plans through the consensus of all entities within the Department which reflect, on a general the Department's geographic policy in the form of preferences among beneficial uses of State lands.

(4) Performance of general policy research at the request of the Commissioner.

(5) Development of policies and Projects, under the direction of the Commissioner, relating to obtaining and defending title to State lands.

(6) Operation of an information program for the Department and a repository for informational materials generated by the Department.

As the interdivisional division within the Department, the Division of Research and Development must undertake all of its responsibilities with the consent of other affected entities rather than unilaterally.

D. Resource Management

The Resource Management function is performed by five divisions. Generally, the Division of Forest, Land and Water Management is responsible for management of the surface and the Division of Minerals and Energy Management is responsible for management of the subsurface. Each of those Divisions is charged with obtaining the consent of the other where proposed actions affect both the surface and the subsurface. In addition where an area of the surface has been designated with a primary beneficial use of agriculture, recreation, or pipeline corridor (through legislative designation regional resource plan, or legal instrument), a proposed action must operate by mutual consent between the Divisions of Agriculture, Parks, and Pipeline surveillance, respectively, and the Divisions of Minerals and Energy Management and Forest, Land and Water Management, as appropriate.

The Division of Forest, Land and Water Management is responsible for general surface management of State lands, including water rights administration, forest development and regeneration, fire protection and suppression, and complete as well as limited disposals of state land for private/municipal use. The Division performs classification of State lands into various retention and disposal categories with respect to the surface, and administers legal documents consummating a disposal into private use or ownership.

The Division of Minerals and Energy Management is charged with the general management of the subsurface of State lands, which is retained even where the surface is disposed of for private use. The Division performs the permitting/leasing of State lands for development of oil and gas, coal, minerals, and geothermal energy resources and administers the permitting/leasing documents for compliance with terms and payment of revenues. In addition, the classification of subsurface lands is effectively accomplished through administration of mineral closing orders.

The Division of Agriculture is responsible for the promotion, development, and financing of the agricultural industry in the State. The Division designs agricultural projects and sales, administers the agricultural loan program, and develops and promotes agricultural products through plant/seed materials development, marketing/transportation research, and state fairs.

The Division of Parks operates the State Park System (consisting of legislatively designated lands and capital facilities) and administers Federal and State grant programs for outdoor recreation, historical preservation, and youth conservation corps.

The Division of Pipeline Surveillance is responsible for administration of pipeline corridors (created through regional plans and a legal instrument in the form of a right-of-way lease) as well as comprehensive preparatory activities which must precede the negotiation of a pipeline right-of-way lease.

Generally, the Resource Management Divisions carry out Projects which have been approved by the Commissioner after raw data has been gathered by the Division of Geological and Geophysical Surveys and alternatives have been submitted to the Commissioner after formulation by the Division of Research and Development.

E. Department Services

Department Services are performed by the Division of Administration and Management and the Division of Technical Services for all entities within the Department. They may occur at any time during the Resource Inventory/Assessment to Resource Research to Resource Management Process.

The Division of Administration and Management generally handles fiscal, personnel, and property matters, monitors compliance with the Project Budgeting/Monitoring/Accounting component of the Department management system, and provides centralized administrative services.

The Division of Technical Services is responsible for surveying and engineering performed on behalf of other Divisions including necessary preparatory work. In addition, the Division administers the State Recorder's Office and serves as the repository for all State land records, which it is charged with maintaining.

An organization chart reflecting the above is attached and incorporated into this Department Order as Attachment I.

II. DELEGATIONS OF AUTHORITY

The responsibilities of each Department entity reflected in the above discussion of the Department Organization are more specifically enumerated and described in the Delegations of Authority. In this document, all of the legal authorities vested by law in the Department are listed and expressly assigned to the Commission, the Deputy Commissioner (who serves in the statutory capacity of Director of Lands) or one or more of the Divisions. Divisions are prohibited from undertaking any ac-

tion inconsistent with the Delegations of Authority, and any action undertaken by the Department must receive the approvals reflected by the allocations of legal responsibilities contained in the Delegations of Authority.

The Delegations of Authority are attached and incorporated into this Department Order as Attachment II.

III. PROJECT BUDGETING/MONITORING/ ACCOUNTING SYSTEM

The Project Budgeting/Monitoring/Accounting component of the Department management system establishes the Department's agenda for the fiscal year and allocates the funds appropriated to the Department by the Legislature. It also monitors progress towards completing the agenda during the fiscal year and insures that funds are being expended for the purpose they were appropriated. This component consists of the following elements.

(1). *Project Budget.* Beginning approximately a year before the start of a fiscal year, the Department formulates its proposed budget. Generally, the Department budget is arranged in a series of Budget Request Units and Components on a programmatic basis; that is, matters of like subject matter are grouped together. Budget Request Units are general (e.g., Forest Management) and Components within Budget Request Units are more specific (e.g., Timber Inventory/Sales, Forest Research, Fire Protection/Suppression). Objectives are set for each BRU.

To formulate the budget, the Department collectively develops a list of individual Projects (which may be operating, capital, or a mixture), which consists of all of the conceivable activities which could be performed during the upcoming fiscal year. To develop the list, the Department considers public demands and expectations, legislative requests or expected interests, requests from the Governor, and the recommendations of the Department managers.

DEPARTMENT ORDER
81-001
ATTACHMENT II

DATE: 7/2/79

VESTED BY
STATUTE IN:

DELEGATED TO:

DEPARTMENT OF NATURAL RESOURCES
DELEGATION OF AUTHORITY
FOR DIVISION OF LANDS

	Commissioner	Director, ADL	Director, FLWM	Director, FLWM	Director, MEM	Director, FLWM (surface) and DMEM (subsurface)	Director, RD	Director, TS	Not delegated	Other/Remarks
	1	2	3	4	5	6	7	8	9	10
AS 16 FISH AND GAME										
AS 16.20.030(b) Zone Potter Point Refuge by regulation	X								X	
AS 16.20.030(d) Zone Goose Bay Refuge by regulation	X								X	
(e) Establish access corridors across Goose Bay Refuge to private land with ADF&G and property owners	X								X	
AS 16.20.032(d) Zone Palmer Hay Flats Refuge by regulation	X								X	
AS 16.20.034(g) Manage surface and subsurface of Mendenhall Flats	X					X				
AS 16.20.036(e) Zone Susitna Flats Refuge by regulation	X								X	
(f) Establish access corridors across Susitna Flats to private land with ADF&G and property owners	X								X	

**DEPARTMENT OF NATURAL RESOURCES
DELEGATION OF AUTHORITY
FOR DIVISION OF LANDS**

DATE: 7/2/79

VESTED BY
STATUTE IN:

DELEGATED TO:

	Commissioner	Director, ADL	Director, FLWM	Director, FLWM	Director, MEM	Directors, FLWM (surface) and DNEM (subsurface)	Director, RD	Director, TS	Not delegated	Other/Remarks
	1	2	3	4	5	6	7	8	9	10
Adopt regulations covering waivers and ensuring fair return to State	X								X	
ARTICLE 4. DISPOSAL OF TIMBER AND MATERIALS										
AS 38.05.110 Provide for timber cruises and appraisals of other materials; recommend sales and terms of sale		X		X						
AS 38.05.115 Determine sales and conditions of sale	X			X						
Negotiate sales of up to 500 m.b.m. of timber or 25,000 cu. yds. materials		X		X						
Approve negotiated sales	X			X						
AS 38.05.118 Negotiate up to 25-year unlimited timber sales in areas of high unemployment		X		X						
Approve such sales	X								X	

DATE: 7/2/79

VESTED BY
STATUTE IN:

DELEGATED TO:

**DEPARTMENT OF NATURAL RESOURCES
DELEGATION OF AUTHORITY
FOR DIVISION OF LANDS**

	Commissioner	Director, ADL	Director, FLWM	Director, FLWM	Director, MEM	Directors, FLWM (surface) and DMEM (subsurface)	Director, RD	Director, TS	Not delegated	Other/Remarks
	1	2	3	4	5	6	7	8	9	10
AS 38.05.120 Determine high bidder; conduct sales; sign contracts; impose conditions		X		X						
Approve contracts and conditions; decide whether to sell at auction or by sealed bids	X			X						
Hear appeals of high bid determination	X								X	
Adopt regulations to determine amount of deposit	X								X	
ARTICLE 5. RESERVATION OF RIGHTS TO ALASKA										
AS 38.05.127 Reserve easements and rights-of-way for access to public waters	X			X						
Adopt regulations	X								X	
AS 38.05.130 Determine amount of surety bond to protect surface owner		X		X						

POLICY STATEMENT ON PRIMARY MANUFACTURE**Section 76.100, "Timber Sale Regulations"**

Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Timber processing wastes from west of 141° Longitude when manufactured into chips are considered to have received primary manufacture and may be exported. Timber processing wastes from east of 141° Longitude in Southeast Alaska when manufactured into chips are considered to have received primary manufacture and export may be permissive only on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue, or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only, e.g., to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 76.130 of the "Timber Sale Regulations" and supersedes all previous policy statements and/or resolutions.

/s/ William A. Egan
WILLIAM A. EGAN
Governor of Alaska

DATE: May 7, 1974

**INDEX TO MATERIALS RELEVANT TO ALASKA
PRIMARY MANUFACTURE REQUIREMENT
ATTACHED TO AFFIDAVIT OF JAMES N.
WANAMAKER (FILED OCT. 16, 1980)**

INDEX TO MATERIALS RELEVANT TO ALASKA PRIMARY MANUFACTURE

Alaska Statutes Concerning Primary Manufacture

There are no Alaska Statutes which require the imposition of primary manufacture on Alaska timber as a condition of export into interstate or foreign commerce.

Alaska Regulations

- Ex. 1: The primary manufacture regulation, 11 AAC 76.130.

Policy Statements and Resolutions

Over the years since 1961 there have been various Policy Statements by Alaska Governors and on one occasion a Resolution passed by the Alaska Senate. These are as follows:

- Ex. 2: Policy Statement of Governor Egan (1961).
Ex. 3: Logan Resolution, Senate Joint Resolution No. 59 adopted March, 1962.
Ex. 4: Policy Statement of Governor Egan (1962).
Ex. 5: Policy Statement of Governor Hickie (1968).
Ex. 6: Policy Statement of Governor Egan (1974).

Attempted Application of Primary Manufacture in Icy Cape No. 2 Timber Sale Contract

- Ex. 7: Notice of Timber Sale.
Ex. 8: Prospectus Version 1 obtained from State about September 9, 1980. See page 3 for primary manufacture requirement.
Ex. 9: Prospectus Version 2 distributed by State after first prospectus. See page 3 for primary manufacture requirement.
Ex. 10: Section 68 of Icy Cape No. 2 Timber Sale Contract.

Objections made by South-Central Against Including Primary Manufacture in Icy Cape No. 2

- Ex. 11: South-Central Timber Development, Inc., testimony for hearings of November 29, and November 30, 1979, cover letter by H. Sugiyama. Exhibit also includes "Alaska Log Export Policy" by Cal Kerr and Merlin Wibbenmeyer.
- Ex. 12: August 21, 1980 letter to Shelley Higgins, Assistant Attorney General with carbon copy to Ted Smith, Larry Dutton, and Russell Harding to effect that primary manufacture is unconstitutional. Exhibit 12 also includes the "Affidavit of Koichi (Clyde) Tanaka—Employment" which shows that round log export has created more jobs than primary manufacture.

**POLICY STATEMENT OF GOVERNOR WILLIAM
EGAN (1961) (EXHIBIT 2 TO AFFIDAVIT OF
JAMES N. WANAMAKER, FILED OCT. 16, 1980)**

GOVERNOR'S OFFICE NEWS RELEASE JUNE 30, 1961

Governor William A. Egan today announced a new State timber export policy permitting conditional export of minor timber species without primary manufacture within Alaska for experimental purposes aimed at building new markets.

The conditional authority would be restricted to a two-year introductory period.

Enunciation of the policy followed receipt of inquiries from several parties interested in the possible export of minor species such as cottonwood, Alaska cedar, aspen and birch.

Primary manufacture within Alaska will continue to be required prior to export of all major timber species such as Sitka spruce, Western hemlock and white spruce, the Governor said.

The policy statement issued by the Governor reads as follows:

"It is the policy of the State of Alaska to protect existing industries, provide for the establishment of new industries, derive revenue from all timber resources, and manage the State's forests on a sustained yield basis."

"The policy of the State of Alaska relating to the export and primary manufacture of timber, within the definition contained in Department regulation is as follows:"

"1. Primary manufacture, as defined by Department regulations, will be required for all major species such as Sitka Spruce, Western Hemlock and White Spruce."

"2. Minor species, such as Cottonwood, Alaska-cedar, Aspen and Birch *may be* exported in the form of round logs, with the advance approval of the Commissioner of Natural Resources on a showing of need for experimental purposes and for the introduction of the species to new markets, when in excess of that required by local industries but within the total allowable annual cut. The State may permit the export of round logs of such minor species to introduce Alaskan timber to new market areas or to new industries for a period of two

years, beginning with the date of first export to that market. Upon conclusion of the two year introductory period, primary manufacture will be required."

* * * * *

**LOGAN RESOLUTION, SENATE JOINT
RESOLUTION NO. 59 (ADOPTED MAR. 1962)
(EXHIBIT 3 TO AFFIDAVIT OF JAMES N.
WANAMAKER, FILED OCT. 16, 1980)**

Senate Joint Resolution No. 59, 1962 Legislature

Senate Joint Resolution No. 59 (adopted March, 1962) provides as follows:

"Relating to the state timber export policy.

"Be It Resolved by the Legislature of the State of Alaska in Second Legislature, Second Session Assembled:

"WHEREAS Westward Alaska has a large potential timber resource which is not being developed and utilized; and

"WHEREAS this replenishable timber resource can be harvested during the winter months of maximum unemployment; and

"WHEREAS the apparent allowable annual cut of the existing stands of mixed timber species far exceeds the demand for domestic uses; and

"WHEREAS there exists an export market willing to absorb this excess;

"BE IT RESOLVED by the Legislature of the State of Alaska in Second Legislature, Second Session assembled, that the Governor of Alaska consider liberalization of the state's timber export policy to allow (1) the extension of the present 2-year permit period allowing export of round logs in the minor species of cedar, birch, cottonwood, and aspen to 5 years, (2) the export of squared hemlock and spruce logs up to 36 inches in diameter cut in domestic mills; and be it

"FURTHER RESOLVED that copies of this resolution be transmitted to the Honorable William A. Egan, Governor of Alaska; the Commissioner of Natural Resources; and to the Director of the Division of Lands."

**POLICY STATEMENT OF GOVERNOR WILLIAM
EGAN (1962) (EXHIBIT 4 TO AFFIDAVIT OF
JAMES N. WANAMAKER, FILED OCT. 16, 1980)**

The 1962 policy statement of Governor Egan following the Logan Resolution was as follows:

"It is the policy of the State of Alaska to manage the State's forests on a sustained yield basis; to protect existing industries; to provide for the establishment of new industries, and to derive revenue from all timber resources.

"The policy of the State of Alaska relative to the export and primary manufacture of timber, within the definition contained in Department regulations, is as follows:

"1. Primary manufacture, as defined by Department regulations, will be required for all Sitka Spruce, White Spruce and Western Hemlock; however, squared Hemlock and Spruce logs up to 36 inches in diameter cut in domestic mills may be exported.

"2. Cottonwood, Cedar, Aspen, and Birch, *may be exported* in the form of round logs with advance approval of the Director, Division of Lands, when supply exceeds that required by local industries, but is within the total allowable annual cut in an established management area. The State may permit the export of round logs of such species for a period of five years beginning on May 1, 1962, and ending on May 1, 1967. Upon conclusion of the five-year period, primary manufacture will be required."

**POLICY STATEMENT OF GOVERNOR WALTER
HICKLE (1968) (EXHIBIT 5 TO AFFIDAVIT OF
JAMES N. WANAMAKER, FILED OCT. 16, 1980)**

POLICY STATEMENT ON PRIMARY MANUFACTURE**Section 406.104 "Timber Sale Regulations"**

Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips made from timber processing wastes shall be considered to have received primary manufacture and export will be permissive on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only, e.g. to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 406.104 of the "Timber Sale Regulations" and supercedes all previous policy statements and/or resolutions.

April 8, 1968

**POLICY STATEMENT OF GOVERNOR WILLIAM
EGAN (1974) (EXHIBIT 5 TO AFFIDAVIT OF
JAMES N. WANAMAKER, FILED OCT. 16, 1980)**

POLICY STATEMENT ON PRIMARY MANUFACTURE**Section 76.130, "Timber Sale Regulations"**

Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Timber processing wastes from west of 141° Longitude when manufactured into chips are considered to have received primary manufacture and may be exported. Timber processing wastes from east of 141° Longitude in Southeast Alaska when manufactured into chips are considered to have received primary manufacture and export may be permissive only on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue, or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only; e.g., to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 76.130 of the "Timber Sale Regulations" and supersedes all previous policy statements and/or resolutions.

/s/ William A. Egan
WILLIAM A. EGAN
Governor of Alaska

DATE: May 7, 1974

**NOTICE OF TIMBER SALE (EXHIBIT 7 TO
AFFIDAVIT OF JAMES N. WANAMAKER, FILED
OCT. 16, 1980)**

**STATE OF ALASKA DEPARTMENT OF NATURAL
RESOURCES DIVISION OF FOREST, LAND AND WATER
MANAGEMENT**

NOTICE OF TIMBER SALE

**Timber Sale SC-557 ADL 203002
Icy Cape No. 2**

Under the authority of AS 38.05.110-.120, the State of Alaska, Division of Forest, Land and Water Management, South-central District, 941 East Dowling Road, Anchorage, Alaska will sell at an oral auction at 2:00 PM October 23, 1980 at the above address the following described timber;

All timber designated for cutting within the protracted Section 32, 33, and 34, Township 21 South, Range 19 East, Copper River Meridian, Sections 1, 2, 3, 4, 5, 11, and 12, Township 22 South, Range 19 East, Copper River Meridian. Sections 6, 7, and 8, Township 22 South, Range 20 East, Copper River Meridian. There are approximately 1,028 acres of cutting area in eight cutting units. An estimated 34,612 MBF of Spruce and 14,573 MBF of Hemlock will be offered. The cutting and removal of timber shall be carried out in compliance with Forest Resources and Practices Act (AS 41.17.010 et seq) and regulations under that act which may be subsequently adopted, and the timber sales regulations (11 AAC 76.005-.385 and 76.600-76.610) in effect at the time of sale.

The contract shall be a new, Division of Forest, Land and Water Management timber sale contract with special provisions added to cover conditions pertinent to this sale. The state reserves the right to reject any and all bids or to award the timber for the amount of the next high bid to the next highest bidder if the director considers the highest bidder unqualified to fulfill the requirements of the contract or if the contract is not executed by the highest bidder. The deposit furnished by a high bidder whose bid was declared acceptable shall be retained as liquidated damages if the high bidder does not execute the contract and furnish a satisfactory bond within 30

days of receipt of the contract for execution, except as provided in Section 11 AAC 76.080(b) of the Timber Sales Regulations. The state reserves the right to waive minor technical defects in this advertisement.

No bids will be accepted for less than \$240.00 per thousand board feet of spruce and \$3.00 per thousand board feet of hemlock for a total consideration of \$8,306,880.00 for spruce and \$43,718.00 for hemlock. The total price consideration includes the weight price of sawlogs and utility logs. Primary manufacture within the State of Alaska will be required as a special provision of the contract. The term of the contract will be five years.

To qualify for oral bidding, bidders must submit a bid deposit of \$836,000.00 either in cash, certified check, cashier's check, money order, or any combination of these, in favor of the State of Alaska, Department of Revenue. The bid deposits shall be submitted to the selling agent prior to 2:00 PM prevailing time on October 23, 1980 at the Southcentral District Office, 941 East Dowling Road, Anchorage, Alaska 99502. All bidders must have proof of a current applicable State of Alaska Business License at the time of bidding. If the bidder is bidding as an agent for an individual, partnership, corporation or other legally established firm, the bidder must submit with the bid deposit written authorization of such agency.

The Contract, prospectus, maps, appraisal, cruise report and further information can be obtained from the Alaska Division of Forest, Land and Water Management at: Southcentral District Office, 941 East Dowling Road, Anchorage, Alaska 99502, Telephone 349-4524; Southeast District Office, Pouch M, Juneau, Alaska 99801, Telephone 465-2433, or the State Foresters Office, 323 East 4th Avenue, Anchorage, Alaska 99501, Telephone 279-5577. Northcentral District Office, 4420 Airport Way, Fairbanks, Alaska 99701, Telephone 479-2243.

/s/ Theodore G. Smith

THEODORE G. SMITH, Director

Division of Forest, Land and Water Management

Publish: September 8, 15, 22 and 29, 1980

AFFIDAVIT OF DAVID E. WALLINGFORD
(FILED OCT. 20, 1980)

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State of Alaska

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Attorneys for Defendant
State of Alaska Officials

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action No. 80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and
THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,
Defendants.

RECEIVED
80 OCT 20 P1:18
WANAMAKER AND
DEVEAU

AFFIDAVIT OF DAVID E. WALLINGFORD

UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

DAVID E. WALLINGFORD, being first duly sworn deposes and states as follows:

1. I am Assistant State Forester in the State of Alaska Department of Natural Resources.
2. I am familiar with the proposed Icy Bay No. 2 Timber Sale. I have been involved in the administrative process of planning and implementing the sale from its inception over a year ago.
3. Over the last year numerous State employees representing four different departments of State government have been actively involved to varying degrees in the process of planning and implementing the Icy Cape No. 2 sale. The following personnel have been involved in planning and implementing the sale: 12-14 employees of the Division of Forest, Land and Water Management of the Department of Natural Resources (DNR); 2 employees from the Division of Parks (DNR); 2 employees from the Commissioner's staff DNR; 6 employees of the Department of Fish and Game; 1 employee of the Department of Environmental Conservation and 1 Assistant Attorney General.
4. The Final Finding attached to this affidavit explains the reasons why the State decided to offer the Icy Cape No. 2 Timber Sale and the considerations underlying the finding that holding the sale at this time is in the best interest of the State. Basically, the economic and employment implications caused by the current timber shortage resulting from suspension of timber sales on federal lands has lead the State to commit a portion of its timber resource at Icy Bay to a 1980 timber sale.

5. The Office of the Division of Forest, Land and Water Management, 423 East Fourth Avenue, Anchorage, maintains a mailing list of potential interested bidders. The mailing of pre-sale information to approximately 20 parties on this list, including the prospectus and the timber sale contract, was completed by September 12, 1980. At least four prospective bidding parties who received the mailing have contacted the office for additional information indicating specific interest in the proposed Icy Cape No. 2 Sale.

6. I have read the Affidavit of James Wanamaker filed in this case. Mr. Wanamaker's affidavit omits the following facts:

(a) Mr. Wanamaker was one of only two potential bidders who received the initial prospectus (version No. 1) prior to the time that the State amended the prospectus to reflect the contract term regarding method of payment. Only the amended prospectus was sent to parties on the mailing list.

(b) Prior to mailing the amended prospectus and the timber sale contract to Mr. Wanamaker on September 12, 1980, Pierre Authier of my office notified Mr. Wanamaker by phone that the prospectus was amended to reflect the contract terms regarding payment.

7. To the best of my knowledge, South-Central Timber Development, Inc., the plaintiff in this case, is the only prospective bidder, out of all the parties who have received information on this sale, to complain that the sale should be cancelled or postponed because of alleged errors and dissatisfaction with contract terms.

8. Harvest operations will not commence under this contract until summer 1981, at the earliest, due to weather conditions which will preclude the new purchasers in this sale from moving equipment into the sale area and constructing roads as required under the contract until April 1981.

9. Since the contract requires reappraisal of the timber annually, beginning in February 1981, it is highly unlikely that

any substantial volume of timber will be harvested prior to the effective date of the first reappraisal. Current applicable cost data will be used in the reappraisals.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 20th day of October, 1980.

/s/ David E. Wallingford

DAVID E. WALLINGFORD

Subscribed and sworn to before me this 20th day of October, 1980.

/s/ Nina S. Bufi

NINA S. BUFI

Notary Public in and for Alaska

My Commission expires: 3/31/83

The undersigned hereby certifies that on the 20th day of October, 1980, the attached documents were hand carried to the attorneys of record.

Shelley J. Higgins

SHELLEY J. HIGGINS

Subscribed and sworn to before me
the date last written

Nina S. Bufi

NINA S. BUFI

Notary Public

My Commission expires 3/31/83

FINAL FINDING

The intent of the Division of Forest, Land and Water Management is to offer by competitive timber sale 44 million board feet of Sitka Spruce and Western Hemlock involving commercial forest land in the Icy Bay/Cape Yakataga area.

The following written finding is intended to satisfy the legal requirements of AS 38.05.035 (a)(14) with respect to the disposal of these timber resources, being in the best interest of the state. In making this determination, the Division has considered the following:

1. Public and interagency input received under AS 38.05.305 and public meetings held in Seward and Anchorage on November 29th and 30th, 1979.
2. Estimated Allowable Cut for Alaska's Timber Resource on State Lands Report (revised 1973), Division of Lands, Department of Natural Resources.
3. Cultural Resources Survey-Icy Bay to Cape Suckling, Gulf of Alaska; Office of History and Archaeology, Division of Parks, May 8, 1980.
4. Report of Preliminary Reconnaissance of the Yakataga and Icy Bay area concerning the proposed Icy Bay No. 2 sale. Division of Forest, Land and Water Management, Southcentral District, September 15, 1979.
5. Proposed Icy Bay No. 2 Timber Sale Analysis, Division of Forest, Land and Water Management, Southcentral District, October 29, 1979.

The primary issues raised in the above and pertinent to this finding were:

Issue

The Icy Bay No. 2 contract shall include the requirement for primary manufacturing.

Finding

Primary manufacture will be required when necessary to assure a continuing supply of timber for existing industry.

The State of Alaska is currently heavily dependent on nonrecurring sources of revenue to pay its expenses. Ninety percent of revenues are derived from petroleum, most of which are from Prudhoe Bay. The State began oil and gas leasing in the early 1960s to develop revenues to (1) pay for government services and (2) to be translated into recurring revenue-sources to maintain state solvency over the long run. For a more detailed history, see the Finding and Decision under AS 38.05.035(a)(14) for the Beaufort Sea Oil and Gas Lease Sale dated October 25, 1979.

The forest products industry of the State represents a source of recurring revenues as it is based upon a renewable resource. It is in the State's interest to maximize revenues and other benefits from selling its commercial forest resources by providing opportunities for economic returns beyond simply selling round logs for export. The primary manufacturing requirement is a means of providing such opportunities.

Economic and employment implications caused by the timber shortage resulting from the suspension of timber sales on the Tongass and Chugach National Forests pending the outcome of (d)(2) and RARE II, has led the division to determine that it is in the public's interest to commit a portion of timber in the Icy Bay/Cape Yakataga area to a 1980 timber sale. For the state to assist existing industry during this temporary shortage of volume from federal lands, the Director has determined that the Governor's Policy Statement of Primary Manufacture dated May 7, 1974, intended to define and clarify 11 AAC 76.130 shall apply in this case.

Issue

The ability of the Yakataga area to sustain a timber harvest increase of 10 million board feet over the next five years.

Finding

The state-owned timber base in the Icy Bay/Cape Yakataga area is not sufficient to sustain a perpetual annual harvest if the annual cut is to be large enough to support an economic operation. The remaining forest base between Icy Bay and Cape Yakataga would allow only 10 more years of harvesting while protecting other resources. As a

result, the Division must review the entire timber base available (Icy Bay to Cape Suckling) even though this additional state land has not been classified for state retention presently. Existing inventory data obtained for the entire area of state land indicates that some 25,000 acres of commercial forest land exists with an annual allowable cut of 25 million board feet over a 100 year rotation for Sitka spruce and western hemlock. Viewing the entire area as a forest reserve the commercial forest land base does have the ability to sustain this timber harvest increase. The decision to continue harvesting this renewable resource was directed by the Governor with supplemental operating appropriations passed by the 1980 legislature specifically for this sale reflecting their interest in having this harvest operation available to the states forest industry.

The Forest Resources and Practices Act Section 41.17.060 (b)(c) which sets out the standards by which timber harvest can take place on state lands has been adhered to in the absence of approved regulations. Once adopted, the Forest Practice Act Regulations will be part of the sale contract, to ensure continuous growing and harvesting of commercial forest species under sound forest practices.

Issue

The compatability of the proposed timber sale with adequate protection for area wildlife.

Finding

Through joint meetings held with the Alaska Department of Fish and Game earlier in the year and two weeks of field work during March recommendations by the Department of Fish and Game (memo of May 2, 1980) concerning fish stream crossings, gravel sources, mountain goat habitat and ingress-regress leave strips for bear inhabitants were formulated. These stipulations worked out between the Division of Forest, Land and Water Management and the Department of Fish and Game update recommendations of earlier Department of Fish and Game memo's and provide reasonable protection to all fish wildlife resources and values present in that area.

Issue

Commercial timber harvest activities in the coastal area must be conducted so as to meet Coastal Zone Management regulations.

Finding

Pursuant to 6 AAC 80.010 (b), the Governor's Administrative Order No. 54 and the Department Order 81/003, the Department of Natural Resources had reviewed the proposed Icy Bay Timber Sale No. 2 for consistency with the Alaska Coastal Management Program (ACMP). The department finds the sale as proposed under the terms of the applicable contract to be consistent with ACMP. The applicable standards of the ACMP and the proposed contract conditions and stipulations which render this timber sale consistent with the ACMP are discussed below:

6 AAC 80.010 - COVERAGE OF CHAPTER

This standard requires the timber sale to be consistent with applicable district programs and the ACMP standards contained in Chapter 6 AAC 80. There is no district (local) coastal management program with jurisdiction over the timber sale area. The city of Yakutat is preparing a coastal management program which, when adopted, may contain recommendations affecting the sale area. Once the local program is adopted by the Coastal Policy Council it will become part of the state regulations. Prospective timber purchasers are required to comply with applicable regulations by section 49 of the sales contract.

6 AAC 80.040 - COASTAL DEVELOPMENT

This standard requires that in planning for and improving development in coastal areas, state agencies shall give priority to (1) water dependent uses and activities, (2) water related uses and activities, and (3) uses and activities that are neither water dependent nor water related for which there is no feasible or prudent inland alternative to meet the public need for the use or activity. This standard also provides that the placement of structures and the discharge of dredged or filled materials into coastal water must, at a minimum, comply with the standards contained in Parts 320-323, Code of Federal Regulations.

These timber resources are located in the coastal area. The major road and harvest unit locations are designed to leave a 400 foot buffer strip along the coast. Any road changes or additions as well as the location of support facilities by the purchaser must be approved by the state. (Sec. 21 of the contract).

The state has applied for a Corps of Engineers permit for the log* dump. (Application date February 5, 1980, NPACP #071-OYD-1-800021). Comments on the application by the Alaska Department of Fish and Game (ADF&G) indicate they found the proposed log dump consistent with the ACMP.

6 AAC 80.050 - GEOPHYSICAL HAZARDS

This standard requires that the state decision makers not approve development in known geophysical hazard areas until siting, design and construction measures for minimizing property damage and protecting against loss of life have been provided. The road locations selected by the state as well as the road, bridge, and culvert construction specifications the purchaser must follow are designed to minimize loss of life and property due to the known soils and flood hazards in the area (Sec. 75 of the contract). Other improvements constructed by the purchaser must be approved by the state (Section 15 of the contract). It is most appropriate to specify design standards to protect against loss of life and property due to geophysical hazards during the approval process required under section 15 of the contract.

6 AAC 80.060(b) - RECREATION

This standard requires state agencies to give high priority to maintaining and, where appropriate, increasing public access to coastal waters. Roads constructed pursuant to this timber sale are public rights-of-way. Access within this coastal area will be increased.

6 AAC 80.080 - TRANSPORTATION AND UTILITIES

This standard requires that transportation and utility routes and facilities in the coastal area be sited, designed and constructed so as to be compatible with district programs, and that transportation and utility facilities be sited inland from beaches and shorelines unless the route

or facility is water dependent or no feasible and prudent inland alternative exists to meet the public need for the route or facility.

The major road network and stream crossings have been located through a joint DNR and Alaska Department of Fish and Game effort. The road locations avoid the immediate coastal area which is protected by a 400 feet buffer. Roads are permitted to extend to tidewater to reach facilities for loading logs on barges. Roads are only located on beaches when this is the best place to locate a river crossing. The purchaser must construct roads within the locations selected by the state. Any additional roads desired by the purchaser must be approved by the state prior to construction (Sections 12 and 21 of the contract).

6 AAC 80.100 - TIMBER HARVEST AND PROCESSING

It is the Department of Natural Resources' understanding that the forthcoming forest resources and practices regulations (11 AAC 96) are intended to replace the standards contained in 6 AAC 80.100. The Icy Bay Timber Sale No. 2 has been designed and the purchaser will be required to comply with the provisions in the forthcoming regulations.

6 AAC 80.120 - SUBSISTENCE

The state agencies are required to recognize and assure opportunities for subsistence usage of coastal areas and resources. The sale area has not been identified as a major area for subsistence usage.

6 AAC 80.130 - HABITATS

This standard lists habitats which are subject to the ACMP and provides standards for management of the listed habitats. The location of roads, stream crossings, cutting unit boundaries and buffer zones for this timber sale were made through a joint Department of Natural Resources and Department of Fish and Game effort. Measures taken to protect the habitats are listed by habitat below:

1. **Estuaries:** A Corps of Engineers permit and multi-agency review of the location and conditions of the log dump and loading facilities is underway. Other estuary areas are avoided.

2. Wetlands and tideflats: See estuary comments.
3. Exposed high energy coast: A 400 feet buffer area is maintained along the coast.
4. Rivers, streams and lakes: Stream crossing locations and construction specifications have been approved by the Alaska Department of Fish and Game. Buffer strips are left along the rivers and streams as requested by ADF&G (April 30, 1980, Regional Supervisor—Rick Reed). Section 68 Stream Protection of the contract specifies procedures to protect streams.
5. Important upland habitat: The winter range for goats is the most often cited important upland habitat in the sale area. Logging operations are not allowed above the 400 foot contour and cutting unit boundaries were modified to protect areas identified by ADF&G as winter range for goats below the 400 foot contour.

6 AAC 80.140 - AIR, LAND AND WATER QUALITY

This standard requires activity to comply with existing regulations on air and water quality. The request for a Corps of Engineers permit for the log dump has been reviewed by the Department of Environmental Conservation and a statement of water quality compliance has been made. (May 22, 1980 Deputy Commissioner C. Deming Cowles). The purchaser will also have to meet any standards applicable to his operations (section 49 of the contract).

6 AAC 80.150 - HISTORIC, PREHISTORIC AND ARCHAEOLOGICAL RESOURCES

The Division of Parks and the State Historic Preservation Officer concluded that there are no known cultural resources and no further investigation is necessary in the Icy Bay Timber Sale No. 2 area. (May 8, 1980, Greg Dixon Archaeologist).

The findings presented above have been reviewed and considered. The case file has been found to be complete. The requirements of all applicable statutes and regulations have been satisfied. Therefore, it is the finding of the Director, that

it is in the best interest of the state to approve this action under the authority of AS 38.05.035 (a)(14) and AS 38.05.120.

Date: 9/5/80

/s/ Theodore G. Smith

THEODORE G. SMITH, Director
Forest, Land and Water Management
Department of Natural Resources

**DEFENDANTS' ANSWER TO PLAINTIFF'S
COMPLAINT
(FILED NOV. 5, 1980)**

Wilson L. Condon
Attorney General
State of Alaska

Shelley J. Higgins
Assistant Attorney General
420 L Street, Suite 100
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(907) 276-3550

Attorneys for Defendant
State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

A80-311 Civil

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and

THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,
Defendants.

RECEIVED
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Burr, Pease & Kurtz, Inc.

STATE DEFENDANTS' ANSWER TO COMPLAINT

Defendants, officials of the State of Alaska, Department of Natural Resources, through counsel, answer the Complaint in this action as hereafter set forth.

FIRST DEFENSE

This Court lacks subject matter jurisdiction over the claims stated in paragraphs 15(B), (C), 16, 17, 18, 19, and 20 for the reason that such claims do not raise a federal question.

SECOND DEFENSE

The Eleventh Amendment to the United States Constitution bars maintenance of the above-referenced claims in federal court against the State of Alaska and the defendant state officials.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

Responding to the numbered allegations of the Complaint, the State answers as follows:

1. The allegations of paragraph 1 are conclusions of law which require no response. However, defendants specifically deny that all of the claims in this action arise under the Constitution of the United States, Article I, Section 8.

2.-12. The allegations of paragraphs 2 through 12 are admitted.

13. The allegations of paragraph 13 are admitted subject to the clarification that primary manufacture of logs removed by plaintiff from the Icy Cape No. 1 Timber Sale is not presently required due to a January, 1979, modification of the timber sale contract which waived the original contract term which required primary manufacture.

14. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15. The allegations of sub-paragraph 15(A) are denied. The allegation of sub-paragraph 15(B) is denied and, moreover, the defendants assert by way of affirmative defense that this Court lacks jurisdiction over the claim stated in this sub-paragraph. The allegation of sub-paragraph 15(C) is denied and the defendants allege by way of affirmative defense that the allegations of this sub-paragraph fail to state a claim.

16. The allegation of paragraph 16 is denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claims stated in this paragraph.

17. The allegation of paragraph 17 is denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claims stated in this paragraph and, furthermore, this paragraph fails to state a claim upon which relief can be granted.

18. The allegations of paragraph 18 are denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claim stated in this paragraph.

19. The allegations of paragraph 19 are denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claim stated in this paragraph.

20. The allegations of paragraph 20 are denied and the defendants allege by way of affirmative defense that this Court lacks jurisdiction over the claim stated in this paragraph.

21. The allegations of paragraph 21 are denied and the State defendants allege by way of affirmative defense that this Court lacks jurisdiction over any claim stated in this paragraph.

22. The allegations of paragraph 22 are admitted.

23. The defendants admit that plaintiff has at the present time only one state timber sale contract (the Icy Cape No. 1 Timber Sale) on which it is conducting logging operations and that it is expected that the Icy Cape No. 1 Timber Sale contract will be finished in two or three operating seasons. The defendants are without knowledge or information sufficient to form a

belief as to the truth of the allegation that plaintiff will face the prospect of having to cease logging operations by reason of the unavailability of timber unless it is permitted to bid on the Icy Cape No. 2 timber sale. The State defendants specifically deny the further allegation that plaintiff will suffer irreparable harm unless the sale is enjoined.

24.-26. The allegations of paragraphs 24 through 26 are denied.

27. The allegations of paragraph 27 are conclusions of law which require no response. However, the defendants specifically deny that in the event that this Court concludes that the sale term of primary manufacture is unconstitutional and the State decides not to re-offer the sale without the primary manufacture requirement, cancellation of the sale would in any way punish plaintiff for insisting upon its constitutional rights. Furthermore, defendants assert that this Court would have no legal grounds or power to order defendants to continue the proceedings for the Icy Cape No. 2 timber sale and to require the State to hold the sale without the primary manufacture requirement.

WHEREFORE, defendants pray that:

1. This complaint be dismissed.
2. That defendants recover their costs and attorneys fees incurred in defending this action.
3. That defendants recover the full cost of cancelling and rescheduling the sale from the bond submitted by plaintiff in connection with the temporary restraining order.

DATED this 5th day of November, 1980.

Respectfully submitted,

WILSON L. CONDON
ATTORNEY GENERAL

By: **/s/ Shelley J. Higgins**
SHELLEY J. HIGGINS
Assistant Attorney General

**STATE OF ALASKA HOUSE OR
REPRESENTATIVES RESOLUTION NO. 3 (1979)
(EXHIBIT A TO MEMORANDUM OF
SOUTH-CENTRAL TIMBER DEVELOPMENT IN
SUPPORT OF SUMMARY JUDGMENT MOTION,
FILED NOV. 18, 1980)**

STATE OF ALASKA
HOUSE OF REPRESENTATIVES
1979

Source

House
Resolve No.
3

HR 5

Relating to an amendment to the Icy Cape No. 1 timber sale, contract number SC-182, permitting exportation of round logs.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

WHEREAS the Alaska Department of Natural Resources let a timber sale contract in Icy Cape in 1969 which specifically prohibited the exportation of round logs as a marketable commodity; and

WHEREAS, as a result of state policy requiring primary manufacture of timber in the state, several sawmills in Alaska have established sawmill operations suitable for primary manufacture of timber; and

WHEREAS people who work in these sawmills are permanent members of their communities, and the sawmills are an integral part of the economies of the communities in which they are located; and

WHEREAS in January, 1979 the state amended the Icy Cape No. 1 timber sale contract, waiving the requirement of primary manufacture of logs in the state contrary to its stated policy; and

WHEREAS waiving of the primary manufacture requirements for timber harvested in Alaska will create great hardships not only for those people who will be unemployed with the closing of the sawmills which depend on primary manufacturing of logs, but also for the affected communities which will lose an economically viable industry; and

WHEREAS the findings made by the Department of Natural Resources which brought about the waiver of

primary manufacture appear to discriminate in favor of the company holding the timber sale contract; and

WHEREAS wilderness proposals under RARE II and pending (d)(2) legislation will most likely reduce the availability of timber in Alaska from other sources;

BE IT RESOLVED by the House of Representatives that the amendment which waived primary manufacture in the Icy Cape No. 1 timber sale is not in the best interests of the state and its citizens, and be it

FURTHER RESOLVED that round logs from the Icy Cape timber sale contract continue to be made available under the timber sale contract to those sawmills in the state which are capable and willing to process these logs into lumber to provide local employment as well as building materials for the Alaska market; and be it

FURTHER RESOLVED that the House of Representatives respectfully requests the Governor to direct the Department of Natural Resources to reevaluate the amendment waiving primary manufacture of timber in the state giving due consideration to all parties who would be adversely affected by permitting export of round logs.

**SENATE RESOLUTION NO. 9 (1979) (EXHIBIT B
TO MEMORANDUM OF SOUTH-CENTRAL
TIMBER DEVELOPMENT IN SUPPORT OF
SUMMARY JUDGMENT MOTION, FILED NOV.
18, 1980)**

**STATE OF ALASKA
SENATE
1979**

Source

Senate
Resolve No.
9

SR 6

Relating to an amendment to the Icy Cape No. 1 timber sale, contract number SC-182, permitting exportation of round logs.

BE IT RESOLVED BY THE SENATE:

WHEREAS the Alaska Department of Natural Resources let a timber sale contract in Icy Cape in 1969 which specifically prohibited the exportation of round logs as a marketable commodity; and

WHEREAS, as a result of state policy requiring primary manufacture of timber in the state, several sawmills in Alaska have established sawmill operations suitable for primary manufacture of timber; and

WHEREAS people who work in these sawmills are permanent members of their communities, and the sawmills are an integral part of the economies of the communities in which they are located; and

WHEREAS in January, 1979, the state amended the Icy Cape No. 1 timber sale contract, waiving the requirement of primary manufacture of logs in the state contrary to its stated policy; and

WHEREAS waiving of the primary manufacture requirements for timber harvested in Alaska will create great hardships not only for those people who will be unemployed with the closing of the sawmills which depend on primary manufacturing of logs, but also for the affected communities which will lose an economically viable industry; and

WHEREAS the findings made by the Department of Natural Resources which brought about the waiver of primary manufacture appear to discriminate in favor of the company holding the timber sale contract; and

WHEREAS wilderness proposals under RARE II and pending (d)(2) legislation will most likely reduce the availability of timber in Alaska from other sources;

BE IT RESOLVED by the Senate that the amendment which waived primary manufacture in the Icy Cape No. 1 timber sale is not in the best interests of the state and its citizens; and be it

FURTHER RESOLVED that round logs from the Icy Cape timber sale contract continue to be made available under the timber sale contract to those sawmills in the state which are capable and willing to process these logs into lumber to provide local employment as well as building materials for the Alaska market; and be it

FURTHER RESOLVED that the Senate respectfully requests the Governor to direct the Department of Natural Resources to reevaluate the amendment waiving primary manufacture of timber in the state giving due consideration to all parties who would be adversely affected by permitting export of round logs.

**AFFIDAVIT OF H. SUGIYAMA (FILED NOV. 18,
1980)**

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.

Civil Action No. A80-311

Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and

**THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska.**

Defendants.

AFFIDAVIT OF H. SUGIYAMA

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

COMES NOW H. SUGIYAMA, and being first duly sworn,
deposes and states as follows:

1. That I am the Vice President of SOUTH-CENTRAL TIMBER DEVELOPMENT, INC. (hereinafter "SOUTH-CENTRAL").

2. That SOUTH-CENTRAL has its principal offices at 255 E. Fireweed Lane, Anchorage, Alaska. Since 1967 SOUTH-CENTRAL has been engaged within the State of Alaska in the business of purchasing standing timber, providing for the logging and preparation of such timber, and exporting the timber in foreign commerce to Japan.

3. SOUTH-CENTRAL also has a branch office in Portland, Oregon. From that office, purchases of logs are made from suppliers in Washington, Oregon, and British Columbia and those logs are exported in foreign commerce to Japan.

4. That I was present in the Courtroom of Judge von der Heydt on October 20, 1980, at the time the MOTION FOR TEMPORARY RESTRAINING ORDER was argued.

5. At that time I heard the arguments of the STATE Defendants to the effect that the sale should be allowed to proceed and SOUTH-CENTRAL could then bid in the sale, and if it wished to challenge primary manufacture, could then file suit challenging said primary manufacture requirement.

6. This possible course of action has been evaluated by me in my capacity as Vice President of SOUTH-CENTRAL. The evaluation has included study of the "Prospectus - Icy Cape No. 2" attached as Exhibits to the AFFIDAVIT OF JAMES N. WANAMAKER and the "Icy Cape No. 2 Timber Sale Contract" attached hereto as Exhibit A (for this purpose only the principal legal provisions are reproduced and the voluminous maps, diagrams, and technical provisions attached to the contract have not been included).

7. In the process of such analysis, I came to the following conclusions as set forth in this affidavit:

A. That as a preface to bidding on Icy Cape No. 2 Timber Sale it would be necessary to make a cash deposit of \$836,000. (See Prospectus.)

B. That the Prospectus provides that the \$836,000 will be forfeited if the proposed Icy Cape No. 2 contract is not signed.

The exact words are found at page 4 of the Prospectus as follows:

"The deposit furnished by the successful bidder whose bid was declared acceptable shall be retained as liquidated damages if the successful bidder does not execute the contract and furnish satisfactory bonds within 30 days of receipt of contract."

C. That if the Icy Cape No. 2 Timber Sale Contract were signed by SOUTH-CENTRAL, it would surely then be argued that SOUTH-CENTRAL had waived its argument against primary manufacture. Also, this step would increase SOUTH-CENTRAL's exposure since it would be necessary to post a Performance Bond of \$836,000 as a part of signing the contract. (See Prospectus and Section 8 of Contract.)

D. Also, it is my evaluation that the STATE OF ALASKA could insist that a challenge to primary manufacture after contract signing would be a failure to abide by contract terms of Icy Cape No. 2 Contract, thereby exposing the Performance Bond to being drawn upon. (Section 8 of Contract.)

E. Thus, it is my overall evaluation that by following the plan of bidding in the timber sale and then suing to remove the primary manufacture requirement, SOUTH-CENTRAL would expose the corporation to the potential loss of the \$836,000 cash deposit, on the one hand, or the argument of waiver and proceedings under the \$836,000 Performance Bond, on the other hand.

8. I reasonably believe that a deposit with the STATE OF ALASKA of \$836,000 would be placed in the General Fund of the STATE and thus beyond the control of this Court, it being the case that the Federal Court has jurisdiction only over Officers of the STATE and not over the STATE itself.

9. SOUTH-CENTRAL has been a small but healthy company over its 13 years of legal existence. It is not, however, sufficiently wealthy to risk the total loss of the cash deposit of \$836,000 or proceedings against its \$836,000 Performance Bond, if posted. This would be an unacceptably severe financial burden to the company.

10. Thus, the concept of bidding on the Icy Cape No. 2 Timber Sale Contract and then suing to enjoin primary manufacture is beyond the financial reach of SOUTH-CENTRAL.

11. If this Court should permit that the Icy Cape No. 2 Timber Sale could continue as first noticed and with primary manufacture required, economics would prohibit SOUTH-CENTRAL from bidding in the contract and suing.

12. I have evaluated the prospect of establishing a method of waste disposal for the sawdust and slabs which would result from a resumption of the primary manufacture slabbing process at SOUTH-CENTRAL's Jakalof Bay mill. I have concluded that there is no system of waste disposal which would meet Alaska environmental requirements which could be installed and amortized within the 49 million board foot volume of the Icy Cape No. 2 Timber Sale.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 18th day of November, 1980.

/s/ H. Sugiyama
H. SUGIYAMA

SUBSCRIBED and SWORN to before me this 18th day of November, 1980.

/s/
Notary Public for Alaska
My commission expires:

**ICY CAPE NO. 2 TIMBER SALE CONTRACT
(EXHIBIT TO AFFIDAVIT OF H. SUGIYAMA,
FILED NOV. 18, 1980)**

ICY CAPE NO. 2 TIMBER SALE CONTRACT

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Exhibits

ADL No. 203002

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FOREST, LAND AND WATER MANAGE-
MENT

Timber Sale Contract No. -SC 557
Timber Sale Name-Icy Cape No. 2

This contract, made and entered into duplicate this ____ day of _____ by and between the STATE OF ALASKA - DEPARTMENT OF NATURAL RESOURCES, by and through the Director, Division of Forest, Land and Water Management, hereinafter called "STATE," and

hereinafter called "PURCHASER," which parties do hereby agree as follows:

Section 1. Incorporation of Full Terms and Conditions.
This contract incorporates and is inclusive of all terms and conditions between the parties hereto, either oral or written, expressed or implied, relating to the subject matter of the contract.

Section 2. Regulations—Exhibits.

(a) The State Timber Sale Regulations in effect on the effective date of the contract are considered a provision of this contract and have the same effect and force as any other provision of this contract (11 AAC 76.135). Subsequent State Forest Resources and Practices Act (AS 41.17.010 et seq) Regulations shall be treated similarly.

(b) The following designated Exhibits, attached hereto, are by this reference made a part of this contract:

- (1) Exhibit "A".
- (2) Exhibit "B".
- (3) Exhibit "C".
- (4) Exhibit "D".

Section 3. Contract Modification. This contract can be modified only by written agreement of the parties.

Section 4. Sale of Timber. Under the terms and conditions of this contract, STATE hereby sells to PURCHASER, and PURCHASER hereby buys from STATE, that timber designated and described in Section 49 of this contract, which timber for all purposes of this contract is hereinafter referred to as "timber." The timber is located on the area or areas shown on Exhibit "A". PURCHASER shall pay STATE the purchase price for timber set forth in Section 50. PURCHASER shall pay the purchase price for timber to STATE in accordance with the payment schedule in Section 49 of this contract.

Section 5. Quantity—Quality of Timber. STATE makes no guarantee or warranty to PURCHASER as to the quantity or quality of the timber.

Section 6. Work to be Done. For all purposes of this contract, "work" shall be understood to mean the furnishing of all labor, materials, equipment, and other incidentals necessary or convenient to the successful completion of the project, duties and obligations, including slash disposal, imposed on PURCHASER by this contract.

Section 7. Duration of Contract. Time is of the essence of this contract, and PURCHASER shall complete and fully perform this contract within the time designated in Section 9, below, unless extended in accordance with Section 37, hereof; provided, however, that under Section 26, hereof, PURCHASER may be required to dispose of slash at a time later than set forth in Sections 9 or 37, hereof.

Section 8. Performance Bond. PURCHASER shall furnish STATE with a performance bond in the amount of _____ The bond shall guarantee complete compliance by PURCHASER with the terms and conditions of this contract, and the faithful performance of all obligations required of PURCHASER by this contract.

Section 9. Completion of Date of Contract. The completion date of this contract shall be _____

STANDARD PROVISIONS

SALE AREA — TITLE TO TIMBER

Section 10. Timber Sale Area. The timber is located on the timber sale area. For all purposes of this contract, "timber sale area" shall be understood to mean the area or the areas designated as such on Exhibit "A." The boundaries of the timber sale area are located by reference to legal subdivisions, monuments, natural land features, improvements or sale boundary signs, which references are designated on Exhibit "A."

Section 11. Title to Timber. The ownership of and title to the timber shall pass to PURCHASER from time to time as and when any of the timber is paid for, cut, and scaled. However, any right of PURCHASER to cut and remove the timber shall expire and end at the time this contract, or any extension thereof, terminates; and further, all rights and interests of PURCHASER, in and to the timber, and logs therefrom; remaining on the timber sale area at said time, shall at that time automatically revert to and revest in STATE, without compensation to PURCHASER.

Section 12. Right to Cut and Remove Timber. During the period of this contract, and any extension thereof, PURCHASER shall have the right to cut and remove the timber; provided, however, the right to cut and remove timber shall be conditioned upon PURCHASER complying with the provisions of this contract.

Section 13. Access. PURCHASER may use the primary or secondary roads shown or indicated on Exhibit "A" for access to the timber sale area. The use of said roads shall be limited to that use necessary in carrying out the terms and provisions of this contract. PURCHASER shall comply with all applicable terms and conditions of any access road easements or agreements set forth in the Special Provisions of this contract, which easements or agreements are by this reference made a part of this contract as if fully set forth herein. Except as is otherwise provided for in this contract, PURCHASER shall have the

right of access over, in and through the timber sale area for the purposes of cutting and removing the timber, or performing the work to be done; such right shall be inclusive of the use and improvement of existing roads, and the construction and use of new roads. STATE shall first approve any improvement or construction before the start of construction. PURCHASER in so using, improving or constructing such roads shall at no time have an interest in the land, other than said right of access.

EXAMINATION—WORK—MATERIALS

Section 14. Examination of Locations and Conditions. It is understood that PURCHASER, before signing this contract, has made a careful examination of all plans and specifications set forth in this contract; that PURCHASER has obtained full information as to the quality and quantity of materials and the character of the work required; and that PURCHASER has made a careful examination of the timber sale area and the location and conditions of work, including sources of supply for materials. STATE in no case will be responsible for any loss or cost that may be suffered by PURCHASER as a result of the failure of PURCHASER to be so informed.

Section 15. Permits—Licenses—Safety. PURCHASER shall procure all permits and licenses, pay all charges and fees, and give all notices necessary and incident to the due and lawful prosecution of the work unless otherwise approved in writing by STATE. In the performance of the work to be done under this contract, PURCHASER shall use every reasonable and practicable means to avoid damage to property and injury to persons. PURCHASER shall use no means or methods which will endanger, unnecessarily, either persons or property. The responsibility of PURCHASER stated herein shall cease upon the work being accepted as complete by STATE.

PURCHASER shall comply with the current "Logging and Sawmill Safety Code."

Section 16. Materials—Improvements. Title to materials, improvements and other property, required of PURCHASER by this contract, shall vest in and become the property of STATE at the time such are furnished by PURCHASER and accepted by STATE. Only materials, improvements and property free and clear of liens, claims and encumbrances shall be so furnished by PURCHASER. Existing improvements in the sale area, owned by STATE, may be used by PURCHASER in connection with this sale without further approval unless such use is limited or prevented elsewhere in this contract. Existing improvements when used by PURCHASER shall be kept in good repair. Any improvements or transportation facilities including sawmills, buildings, bridges, roads, etc. constructed by PURCHASER in connection with this sale and within the sale area or on other STATE land leased for the purpose must be authorized by, and must be in accordance with standard or special plans approved by STATE.

Section 17. Responsibility for Work. Before completion and final acceptance of work PURCHASER shall be held responsible for any injury or damage to the work or to any part thereof by action of the elements, or from any cause whatsoever, and PURCHASER shall make good all injuries or damages to any portion of the work.

Section 18. Final Inspection. Except as otherwise provided in the Special Provisions of this contract, STATE will make final inspection of work done by PURCHASER within 10 days after written notification to STATE by PURCHASER that the work is completed. If the work is not acceptable to STATE, then STATE will so advise PURCHASER in writing as to the particular defects to be remedied before final acceptance by STATE can be made.

Section 19. Materials from State Property. PURCHASER shall not take, sell, use, remove or otherwise dispose of any sand, gravel, rock, earth or other material obtained or produced from within the limits of rights of way, gravel pits, rock quarries or other property owned by or held by STATE, unless authorized by this contract or written consent of STATE.

Section 20. Prosecution of the Work. PURCHASER shall not commence work to be done under this contract until the contract has been fully executed.

LOGGING TIMBER SALE AREA

Section 21. Notification of Operation. At least 30 days before commencement of operations on the contract area PURCHASER shall notify STATE, in writing, of the date he plans to begin operation; PURCHASER shall also notify STATE, in writing, if he intends to cease operation for a period of 15 or more days.

Section 22. Annual Operating Plan. PURCHASER shall, prior to commencing any work, and prior to the start of operations each year thereafter, submit to STATE for review and approval an operating plan which shall be followed except as modified in writing. The Operating Plan shall be in writing and shall show:

- (1) Sale contract number and name.
- (2) Approximate date project work will commence.
- (3) Approximate date logging operations will commence.
- (4) Authorized representatives of PURCHASER, as required by Section 44.
- (5) Portions of the required project work or logging operations to be subcontracted, if any, and the names of such subcontractors as required by Section 41.
- (6) General location of spur roads not designated on Exhibit "A" which may be constructed pursuant to Section 13.
- (7) Location of tractor yarding roads, if approval of such by STATE is required in this contract.
- (8) Temporary stream crossings, where necessary to protect the watershed, as required by Section 27.
- (9) Location of landings and probable sequence of logging.

(10) Log brand or brands to be used on logs from the timber sale area.

PURCHASER shall log the timber sale area and construct the projects in a workmanlike and orderly manner using the methods and practices generally acceptable in the logging industry. The schedule of approximate starting dates and the sequence of logging may be subject to modification when necessitated by weather or other unpredictable circumstances, provided PURCHASER gives 15 days notice to STATE.

STATE will furnish PURCHASER additional copies of Exhibit "A" or other suitable maps which PURCHASER shall use for showing locations of work specified in (6), (7), (8) and (9) of this section.

STATE will, within a reasonable period of time acknowledge in writing to PURCHASER the receipt of the Operations Plan, and shall designate to PURCHASER the authorized field representative of STATE to be readily available to the area of construction and logging operations and to receive notices in regard to performance under this contract.

STATE will within a reasonable period of time of receipt of the Operations Plan review the plan and give to PURCHASER written notice of approval or disapproval.

When the Operating Plan contains information PURCHASER is required to furnish to STATE by other sections of this contract, written approval of the Operating Plan by STATE will constitute acceptance and approval of such information.

Any deviation from the approved plan must have prior written authorization from STATE and may require amendment of the approved plan. Authorization from STATE to deviate from the approved plan shall be requested in writing by PURCHASER. Unapproved deviation from the plan may be cause for suspensions of operations under this contract.

Section 23. Damage to Reserved Trees. For purposes of this section, "reserved trees" are those trees on the timber sale area, or on adjoining STATE property, which are not sold to or

are not to be cut by PURCHASER. If in connection with operations under this contract the PURCHASER, his contractors, subcontractors, or employees of any of them, cuts, injures, or removes any reserved trees, PURCHASER shall pay for such trees at rates determined by STATE as follows:

(1) Damage to reserved trees in the course of normal logging shall be paid for at the current contract rate.

(2) Damage to reserved trees caused by negligent or careless operations of PURCHASER shall be paid for at double the current contract rate.

(3) Repeated damage to reserved trees will be cause for suspension of this contract.

(4) Payment shall be made by PURCHASER within 10 days after written demand by STATE; provided, the payment for reserved trees shall not release PURCHASER from liability for other damage to the property of STATE.

Section 24. Monthly Report. On or before the 10th day of each month that this contract is in effect, PURCHASER shall provide STATE with a written report revealing the net board foot volume of timber removed from the timber sale area for the previous month. For recovery or scale sales, such report shall itemize by certificate number or ticket number the net scale volume of all logs, by species scaled during the preceding calendar month. All books and records relating to scale shall be kept in accurate and complete form by PURCHASER, and the same shall be available for the inspection of STATE or its representatives at all reasonable and convenient times and places.

Section 25. Slash Disposal. The term "slash" used in this contract means all debris resulting from logging operations, construction of roads or other improvements, or windthrow timber within the sale area. PURCHASER shall bunch slash in tractor-yarded areas as directed by STATE. PURCHASER agrees to treat or dispose other of slash as STATE may require, and at such times and in such manner as STATE may specify.

Section 26. Protection of the Watershed. PURCHASER shall take all practicable precautions to prevent damage to the soil, stream banks, and any stream course, lake or reservoir on or near the timber sale area, and to that end shall comply with Alaska laws and with regulations promulgated under the Forest Resources and Practices Act.

In addition to other protective measures required herein, PURCHASER shall discontinue all or part of the operations under this contract upon notice from STATE that due to weather conditions such operations will cause excessive damage to the watershed.

PURCHASER shall:

(1) Fell adjacent trees away from or parallel to the stream channel so that such trees do not fall or slide into the stream channel.

(2) Not operate tractors within 100 feet of streams, unless authorized in writing by STATE.

(3) Not cable-yard logs across streams unless approved by STATE in the Operating Plan.

Section 27. Safeguarding Improvements. All existing improvements located on or in the timber sale area, and, any improvements placed on or in the timber sale area by PURCHASER which become the property of STATE, shall be safeguarded by PURCHASER, and if injured or damaged by PURCHASER or by contractors of PURCHASER, shall be repaired as soon as possible to previously existing conditions by PURCHASER, without cost to STATE.

Section 28. Preservation of Markings and Monuments. PURCHASER shall not remove, alter, damage or destroy any signs, posters, land survey corners, witness trees, or corner reference tags pertaining to the timber sale or land survey. If PURCHASER unintentionally damages or disturbs any such markings or monuments, PURCHASER shall be immediately report that occurrence to STATE, and further damage or disturbance shall be prevented by PURCHASER. If PUR-

CHASER damages or disturbs any such markings or monuments, or fails to immediately report such to STATE, or completely destroys any land survey corner, PURCHASER shall re-establish such markings, monuments or corners at his expense to the standards prescribed by STATE.

In the event it is necessary, for the conduct of logging operations or road construction, to disturb any legal land survey corner, PURCHASER shall so notify STATE and shall not disturb such corner until PURCHASER has referenced or otherwise preserved the corner, in a manner acceptable to STATE.

Section 29. *Simultaneous Use of Area.* STATE reserves the right to issue written authorization to others to use the timber sale area or access roads thereto, provided, in the determination of STATE, such use will not materially interfere with the operations of PURCHASER. STATE further reserves the right to sell from the timber sale area during the period of this contract any products or materials not covered by the terms of this contract; provided that removal of such products or materials shall not materially interfere with the operations of PURCHASER. PURCHASER shall not unduly interfere with the use of roads by other authorized users. PURCHASER shall not be held liable for any acts, omissions or neglect of authorized simultaneous users.

Section 30. *Primary Road Maintenance.* If PURCHASER is the only user of the primary roads as shown or indicated on Exhibit "A," then PURCHASER shall perform all normal road maintenance, as defined in Section 31, which is made necessary by his use. If PURCHASER jointly uses the roads with other parties authorized under this contract, each shall be responsible for a proportionate part of the normal maintenance, based upon the ratio of each parties' use to total road use.

If STATE, during any period of this contract, cause any of the primary roads to be maintained by STATE equipment, through road maintenance contracts with independent contractors, or through agreement with third party users, then

PURCHASER shall pay to STATE or to the third party at the rates per thousand board feet, net scale, for all logs hauled by PURCHASER over such roads, as set forth in the special provisions of this contract. If STATE terminates the contracted or third party maintenance during the period of this contract, PURCHASER shall remain responsible for all normal maintenance of the roads, or for a proportionate part of the maintenance during periods of joint use with other authorized users.

Section 31. Maintenance Defined. Normal maintenance shall include work needed to protect the road from seasonal weather damage, to restore damage or wear caused by PURCHASER'S use, and to safeguard soil, water, and drainage structures, as follows:

(a) Maintenance of the existing cross section of dirt, gravelled, or shot rock road by blading or shaping surface and shoulders. Banks shall not be undercut, and established berms shall be maintained. Additional berms shall be placed where needed to protect fills.

(b) Removal of bank slough, minor slides and fallen timber, replacement of material eroded from fill slopes and by minor washouts, and cleaning out of ditches and culverts. The work shall be that which can practically be accomplished by a motor patrol grader equipped with a front end blade, or comparable equipment, and by the use of hand tools.

(c) Preventive maintenance at the end of PURCHASER'S hauling each season to minimize weather damage during the non-hauling period. This may include shaping and grading, cross-ditching, and removal of debris from any stream channel, when the debris was caused by PURCHASER'S activities and when the debris is endangering or will cause damage to roads, bridges, or culverts.

(d) Patching and additional rocking of gravel road surfaces as determined necessary by STATE to repair or restore damage and wear caused by PURCHASER'S operations.

(e) Removal of brush or tree growth or other obstructions to visibility as the obstructions develop during the contract period. Herbicides may be used only with written authorization of STATE.

While performing normal maintenance work, PURCHASER shall avoid leaving dirt or debris on gravel or bituminous road surfaces. PURCHASER shall avoid blading surface material off surface of roads, and shall minimize damage to road surfaces and ditches caused by logging operations, and shall restore the road to its original condition within a reasonable period of time.

Section 32. Secondary Road Maintenance. Secondary truck roads used or constructed by PURCHASER shall be kept free of obstructions and maintained in a condition to permit travel by standard-drive automobiles during any period of log hauling operations under this contract, and during closed fire season. PURCHASER shall leave these roads open and passable upon completion of operations under this contract, unless otherwise instructed by STATE.

FIRE PROTECTION

Section 33. Fire Protection. PURCHASER shall take all necessary precautions for the prevention of forest fires and shall be responsible for the suppression and bear the suppression costs of any and all fires occurring within or without the contract area resulting from any and all operations involved in the removal of the timber under the provisions of this contract.

The Alaska Forest Protection Act (AS 41.15.010 et seq.) established the fire season from May 1 - September 30. AS 41.15.080 requires every person owning or operating a sawmill or logging camp or other commercial plant or operation in forested lands to post and keep displayed at all times a copy of AS 41.15.050 — 080 and AS 41.15.140 in a conspicuous place upon the building or ground of the milling, logging or commercial operation.

PAYMENT BOND—INDEMNITY

Section 34. Payment Bond. PURCHASER shall furnish an acceptable bond in the form of surety bond, cash bond, negotiable securities or an individual surety bond acceptable to STATE to guarantee payments for timber from this timber sale contract between STATE and PURCHASER. The bond or securities shall be in the amount of \$250,000. When the payment bond has been furnished to STATE, the bid deposit will be refunded to PURCHASER.

Section 35. Indemnity. PURCHASER shall be responsible and liable for all accidents, damage or injury to any person or property resulting from any activities, duties and obligations of PURCHASER under this contract for which PURCHASER may be legally liable, and PURCHASER shall hold blameless and harmless, and shall indemnify, the State of Alaska and its officers, employees and agents against any and all claims, demands, loss, injury, damage, actions and costs of actions whatsoever, which they or any of them may sustain by reasons of any act, omission or neglect of PURCHASER, or employees, agents, representatives or contractors of PURCHASER, in connection with the activities, duties and obligations of PURCHASER under this contract.

ADMINISTRATION OF CONTRACT

Section 36. Extension of Time. An extension of time of this contract, not to exceed one year at a time, will be approved by STATE only upon written request from PURCHASER and with the written consent of the surety of PURCHASER; an extension will be granted only upon a showing by PURCHASER that the failure to perform this contract within the specified period was due to causes beyond the control of PURCHASER and without fault or negligence of PURCHASER. The written request must be received not later than 30 days or earlier than 90 days before the expiration date of this contract. The request shall state the date to which the extension is desired and must describe the conditions which have prevented PURCHASER from completing this contract within the specified time.

Section 37. Alterations in Details. STATE reserves the right to make, at any time during the progress of the work to be done, the minor changes or alterations in cutting boundaries, drainage structures, etc. as STATE may determine to be necessary or desirable. However, the changes or alterations shall not change the character of the work to be done, nor increase the cost thereof unless the cost increase is approved in writing by PURCHASER. Any changes or alterations so made shall not invalidate this contract nor release the surety of PURCHASER on the performance bond, and, PURCHASER agrees to do the work as changed or altered as if it had been part of the original contract.

Section 38. Reservations for Scenic Purposes, Fish and Wildlife Habitat Protection. STATE may reserve from designated cutting units timber that (a) has or may subsequently develop special scenic values in connection with water courses and recreational sites, or (b) cannot be logged without disturbing wildlife and fisheries habitat under AS 16.05.840, AS 16.05.870 and AS 41.17.010, et seq. Insofar as practical, the STATE shall identify these reservations before the purchaser submits his annual Operating Plan. Reservations under this section will be confined to the smallest reasonable area necessary and will not reserve more than five million board feet of spruce and hemlock from the cutting units as designated on Exhibit "A."

Section 39. Violations, Suspension and Cancellation.

(1) If PURCHASER violates any of the terms or conditions of this contract, including the approved Operating Plan, STATE shall notify PURCHASER in writing of the violation, and allow a reasonable period of time to comply with the contract. If satisfactory compliance is not made within the time allowed, STATE may suspend by written notice further operations under the contract, except those operations as may be necessary to remedy the violation. The suspension will continue in effect until PURCHASER complies with the contract in a manner satisfactory to STATE.

(2) STATE may immediately suspend by written notice further operations that, in the judgment of STATE, constitute a threat of immediate and unacceptable resource damage or an immediate threat to human life.

(3) If PURCHASER fails to remedy violations of this contract within 30 days after receipt of the notice of violation given under this section, STATE may, by written notice, cancel this contract and take appropriate action to recover all damages suffered by STATE by reason of the violations, including application of the payment bond and/or performance bond toward payment of the damages.

Section 40. Subletting of Contract. It is understood and agreed that, if all or any part of the logging operations or work to be done under this contract is subcontracted, the subcontracting done by PURCHASER will in no way relieve PURCHASER of any responsibility under this contract. PURCHASER will notify STATE of the names and addresses of all subcontractors. Subcontracting must be acceptable to STATE.

Section 41. Assignment of Contract. PURCHASER agrees not to assign, transfer, convey or otherwise dispose of this contract, or the right, title, or interest therein, either in whole or in part, or the power of PURCHASER to execute this contract, to any other person, firm, or corporation, without the previous written consent of STATE.

Section 42. Notices. Any written notice to PURCHASER which may be required under this contract to be served on PURCHASER by STATE, may be served by personal delivery to PURCHASER or the designated representative or representatives of PURCHASER, or by mailing the notice to the address of PURCHASER as given in the contract, or by leaving the notice at that address. If PURCHASER is required to notify STATE concerning the progress of the work to be done, or concerning any matter or complaint which PURCHASER may have to make regarding the contract subject matter, or for any other reason, that notification must be made

in writing, delivered to the designated representative of STATE in person, or mailed to the address of STATE as given in this contract.

Section 43. Authorized Representative. During any period of logging operations or activity on the timber sale area, and during any period of doing the work required by this contract on location, PURCHASER shall have a designated representative or representatives available to STATE on the timber sale area or work location, or both where the activity is separated; the representative or representatives shall be authorized to receive on behalf of PURCHASER any notice or instructions from STATE and to take whatever action may be required in regard to performance of PURCHASER under this contract. STATE shall designate an authorized field representative or representatives who shall be authorized to receive notices, inspect progress of work, and issue instructions in regard to performance under the terms of this contract.

Section 44. Inspections and Records. STATE, through its authorized and designated representative or representatives, shall at all reasonable times be allowed access to all parts of the logging operations and work locations of PURCHASER, and shall be furnished all information and assistance by PURCHASER, or the designated representative or representatives of PURCHASER, as STATE may require to make a complete and detailed inspection.

STATE through its authorized and designated representatives, shall have access at all reasonable times to the books and records of PURCHASER, his contractors, and subcontractors relating to operations under this contract including operating cost data and selling price data. Information so obtained shall be treated as confidential and used solely for the administration of this contract.

Section 45. Removal of Equipment and Materials. It is understood and agreed that PURCHASER, upon completion of the requirements of this contract, is to promptly remove from the timber sale area and work location, and other property owned or controlled by STATE, all equipment, materials

and other property PURCHASER has placed or caused to be placed thereon that is not to become the property of STATE. It is further understood and agreed that any such equipment, materials and other property that are not removed within 90 days after the day this contract terminates, or within any longer period of time as may be agreed upon in writing between PURCHASER and STATE, shall become the property of STATE and may be used or otherwise disposed of by STATE without obligation to PURCHASER or to any party to whom PURCHASER may transfer title. Nothing in this section shall be construed as relieving PURCHASER from an obligation to clean up, and to burn, remove, or dispose of debris, waste, and similar materials, in accord with other provisions of this contract.

Section 46. Causes Beyond Control. In the event PURCHASER is prevented by a cause or causes beyond control of PURCHASER from performing any obligation of this contract, nonperformance resulting from such cause or causes shall not be deemed to be a breach of this contract which will render PURCHASER liable in damages or give rise to the cancellation of the contract. However, if and when such cause or causes cease to prevent performance, PURCHASER shall exercise all reasonable diligence to resume and complete performance of the obligation with the least possible delay. The phrase "cause or causes beyond control," as used in this section, means any one or more of the following causes which are not attributable to the fault or negligence of PURCHASER and which adversely affect the operations of PURCHASER: fire or other casualties and accidents; strikes, riots and civil commotions; war and acts of public enemies; storms, floods and other unusual climatic conditions, including droughts or orders of duly constituted public authorities; and other similar circumstances beyond the control of PURCHASER.

Section 47. Laws, Regulations and Orders. PURCHASER at all times shall observe and comply with federal and state laws, and lawful regulations issued thereunder, and local by-laws, ordinances and regulations, which in any manner affect the activities of PURCHASER under this contract.

SPECIAL PROVISIONS

Section 48. Designated Timber. Pursuant to Section 4 of this contract, the timber sold within the sale area is as follows:

All timber within Units 5, 6, 7, 8, 9, 10, 11 and 12, and all right-of-way timber.

The boundaries of the sale area are marked as follows:

- (1) The unit boundaries are painted and flagged.
- (2) The right-of-way boundaries are flagged and blazed.

Section 49. Payment Schedule. (a) PURCHASER shall pay within 10 days of the first of each month for all timber cut and scaled the previous month.

(b) All payments and deposits shall be made payable to the Alaska Department of Revenue and shall be submitted to the Southcentral District, Division of Forest, Land and Water Management, Department of Natural Resources.

Section 50. Purchase Price. The purchase price for all timber removed from the timber sale area shall be paid for on the basis of net log scale, unless otherwise specified at the rates set forth below:

Species	Estimated Volume	Unit Price	Total Price	Bid Premium
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Section 51. Rate Redetermination. STATE shall redetermine the stumpage rates annually. Rates will be redetermined in February of 1981, and each February thereafter during the life of this contract using the amendments and interim updates of the United State Forest Service for the fourth quarter of the previous year.

To determine stumpage rates STATE will use procedures in effect in the Timber Appraisal Handbook of the United States Forest Service at the time of the redetermination. Bid Premium rates shall be added to all redetermined rates.

Section 52. Merchantable Logs. PURCHASER shall remove all products from the sale area which meet the merchantability standards stated herein:

Any conifer log which is 12 feet or more in length, and is 6 inches or more in scaling diameter and which will produce not less than 50 percent of the gross volume in firm, useable chips.

PURCHASER may remove logs from timber sold on the sale area which do not meet the standards listed below.

Section 53. Log Measurement.

(1) *Scaling Locations, Rules, Scaling Parties.* All logs from timber sold under the terms and conditions of this contract shall be scaled before they leave the log transfer site at Icy Bay. Determination of volume shall be made in accordance with the published Official Log Scaling and Grading Rules in use by the Puget Sound Log Scaling and Grading Bureau, with the following exceptions concerning spruce and hemlock:

(a) For scaling purposes, the minimum volume of #3 sawmill logs has been amended downward to 10 board feet net scale, which results in a combination of #3 and #4 sawmill grades.

(b) In scaling logs over 42 feet in length, each segment shall be scaled independently of each other using the actual scaling diameter of each segment, rather than the "one-in-ten rule."

Scaling shall be done by a log scaling and grading bureau, independent third-party agency, firm or corporation, approved by STATE. PURCHASER shall enter into a written agreement with the approved third-party scaler for the scaling of logs removed from the timber sale area. PURCHASER shall furnish STATE with a copy of the scaling agreement upon request.

(2) *Costs of Scaling.* All costs of scaling shall be paid by PURCHASER. All costs incurred by PURCHASER in connection with reports furnished STATE will be paid by PURCHASER.

(3) *Scaling Instructions.* PURCHASER shall require the scaling party to furnish to STATE, by the 10th of each month copies of all scale certificates and/or scale tickets showing gross

and net volumes by species of all logs scaled during the previous month. Upon request by STATE, PURCHASER shall also require the scaling party to furnish and attach a log detail listing to each monthly scale certificate showing all STATE logs included on the certificate.

PURCHASER agrees that STATE may provide written information and instruction to the scaling party for the scaling of logs in accordance with terms of this contract, including request for copies of scale certificates and log detail lists to be furnished directly to STATE. A copy of all such instructions shall be furnished by STATE to PURCHASER.

(4) Utilization. PURCHASER shall not deliberately buck timber to reduce the size of logs to less than the minimum merchantability standards of this contract, and shall take reasonable precautions to prevent loss due to breakage in felling and yarding of timber. PURCHASER shall buck logs in various lengths to secure the greatest practicable utilization of timber. For purposes of merchantability, minimum net log volume shall be determined by the net volume of the full log length rather than the volume of individual segments.

(5) Converting Factors. STATE may approve the use of appropriate converting factors, sample scaling techniques, and measurement by weight, when these methods are a more practical means to measure the timber and logs sold by this contract.

(6) STATE will provide for check scale of state timber at intervals to be determined by STATE, or its authorized representative, and in the event the check scales show a variance of \pm two percent net scale, STATE may request the scaling party to make a rescale. In the event the scaling party determines it necessary to demand compensation for the cost of making rescales, PURCHASER agrees to pay the scaling party the cost of the services. PURCHASER agrees to cooperate with STATE in providing conditions satisfactory to make check scales.

(7) PURCHASER will submit to STATE, in duplicate, a raft receipt for each raft before shipping logs from Icy Cape.

Section 54. Penalty Scale. STATE shall scale logs or portions of logs broken or wasted by PURCHASER due to: (1) improper felling or bucking of the logs, (2) failure to remove the logs before deterioration, (3) logs remaining on the sale area after completion of logging; provided such logs were merchantable before breakage or wastage. PURCHASER shall pay for these logs at the contract price designated in Section 51. STATE shall immediately notify PURCHASER of the volume of logs so scaled. Payment shall be considered due on that volume as if the logs were removed on the date of the notification.

If PURCHASER disagrees with the findings made by STATE under this section, PURCHASER may furnish scaling by a third-party who shall be an authorized scaler for a log scaling and grading bureau or other qualified person; the third-party must be acceptable to STATE. Costs and expenses of the third-party shall be paid for by PURCHASER and the findings of the third-party shall be final.

Section 55. Felling. PURCHASER shall comply with the following requirements for felling on the scale area.

(a) Fell all trees and snags within the limits of the right-of-way, and all trees within the unit boundaries.

(b) Use Humboldt undercuts in felling all merchantable trees.

(c) Stumps will be cut so as not to exceed a height of 18 inches as measured on the side adjacent to the highest ground, except when determined by STATE. High stumps shall be paid for by PURCHASER at the rate of \$5.00 per stump, which sum shall be regarded as fixed, agreed, and liquidated damages.

Section 56. Felling Exceptions. STATE may reserve trees which are needed to protect and preserve nests and habitat of large or rare birds, e.g., ospreys, eagles, hawks, owls and pileated woodpeckers. STATE shall designate, before timber felling, the trees which are reserved and must not be cut.

Section 57. Timber Removal Schedule. A minimum of 20 million board feet of timber shall be cut and paid for three years from the effective date of the contract.

Section 58. Log Branding. Every log removed from the timber sale area by PURCHASER shall be branded unless otherwise approved in writing by STATE. PURCHASER shall only use the brand or brands designated or approved by STATE. STATE may issue to PURCHASER one or more STATE branding hammers, which shall be used to brand all logs removed from the timber sale area; and PURCHASER shall reimburse STATE for any branding hammers lost or damaged by PURCHASER. PURCHASER shall not have branding hammers on the timber sale area other than those approved by STATE in accordance with this section.

Section 59. Tree Markings. PURCHASER shall not remove, alter, damage or destroy any tree markings, and shall immediately report to STATE any markings damaged or destroyed. PURCHASER shall not cut or remove logs from any tree which has a damaged or destroyed marking until the marking has been restored by STATE.

Section 60. Method of Yarding. PURCHASER shall use only cable systems for yarding the timber sale area. The cable system shall fully suspend logs when yarding across anadromous streams. Tractor yarding of logs on road and landing locations may be permitted upon written approval of STATE.

Section 61. Progressive Logging. PURCHASER shall complete the following logging requirements on each setting before moving to a new setting, unless otherwise approved in writing by STATE;

- (1) Remove all merchantable logs from the setting.

(2) Construct cross-drainage ditches or waterbars as directed by STATE and in accordance with Section 27 of this contract.

(3) Remove slash and debris resulting from PURCHASER'S activities from streams as an ongoing process during logging.

To facilitate inspection of settings, PURCHASER shall give STATE five days advance notice of the anticipated completion date of logging operations on each setting. STATE shall complete the inspection within 2 days after receiving notification.

Section 62. Landings. Before yarding, PURCHASER shall mark the locations of suitable landings on the ground, show their location in the Operating Plan, and obtain written approval from STATE of the locations, under Section 22 of this contract. If necessary, STATE may mark additional timber as needed to construct landings. This timber shall be paid for at the same rate as the purchase price for contract timber. PURCHASER shall not yard logs across any STATE primary road and shall deck logs only at approved landings.

Section 63. Road and Landing Construction. PURCHASER shall take all measures which STATE determines necessary to protect stream banks and stream courses during road and landing construction, and to prevent erosion and dislocation of exposed soil and fill material, including but not limited to the following:

(a) All roads must be built to the specifications described in Exhibit "B," unless otherwise approved by STATE.

(b) All roads must be constructed following P-Line locations and drawings as marked on the ground by STATE unless special written permission is granted by STATE to change these locations.

(c) Temporary roads, tractor swings roads, and landings must be constructed of gravel or shotrock over unbroken ground surface where practical. Cuts, overcasts and areas of

unstable materials shall be avoided. When PURCHASER finds it impractical to avoid unstable areas, PURCHASER shall request an on-the-ground joint examination with STATE for the purpose of determining an acceptable solution. After the joint site examination, STATE will issue a written decision with respect to the location of the road or landing.

(d) Unless otherwise approved in writing and staked on the ground by STATE, road fill placed by PURCHASER shall not cover, encroach on, or alter permanent or intermittent water channels.

(e) When rock overlay material is used over decking on native log bridges, side logs or wood chinking, a woven or polypropylene fabric blanket shall be installed prior to depositing rock overlay materials. Streams shall be cleared of debris which results from PURCHASER'S operations and which may affect the natural flow of the stream. Heavy equipment shall not be operated in streams except at designated crossings and when essential to construction of culverts and bridges.

Section 64. Road Maintenance.

(a) In removing material from sliders or other sources, PURCHASER shall deposit the material so that the material will not erode into streams, lakes, or reservoirs, as designated by STATE.

(b) All spur roads shall be put-to-bed within 6 months after use of the road has been terminated. PURCHASER will out-slope roads, install cross ditches, remove culverts and clean ditches as is needed to prevent serious soil washing and to keep the discontinued road from permanently affecting the natural pattern of surface drainage in its vicinity. Debris from log culverts shall be randomly dispersed over the road template and shall be laid on the ground in a near natural location.

(c) On cut and fill slopes, waste and spoil areas susceptible to erosion, or along roads constructed or used by the PURCHASER, PURCHASER shall revegetate by seeding with grass. STATE may require fertilization and mulching as part of the revegetation work.

(d) The primary road will be stabilized after use has been terminated. All bridge stringers shall be removed and laced on the east banks of each stream or river. All debris shall be removed from the cutslope and ditches. All ditches shall be cleaned. If a berm has developed on the road template, it shall be removed or, if STATE approves or directs openings in the berm shall be constructed as marked on the ground.

(e) The road surface shall be graded to a uniform flat surface with approximately 2 percent outslope, if it has been constructed with no ditch, and graded with a crown if constructed with a ditch to aid surface runoff. In both instances all wheel ruts will be eliminated.

Section 65. Permits. STATE shall secure the necessary permits from the U.S. Army Corps of Engineers for log transfer and storage areas. STATE shall also secure the necessary permits under AS 16.05.870 and AS 38.05.330.

Section 66. Fire Protection. During the fire season, PURCHASER shall provide and maintain sufficient fire-fighting tools in the sale operating area to equip each man engaged in the logging operation. In addition, PURCHASER may be required, during periods of high fire danger, to have the following equipment on the sale area:

(1) Water supply: a self-propelled tanker or portable trailer in operable condition of not less than 300 gallons;

(2) Water pump: size and capacity must be such that the pump will provide a discharge of not less than 20 gallons per minute when pumping through 50 feet of hose equipped with a one-quarter inch inside diameter nozzle at pump level;

(3) Hose and nozzle: at least 500 feet of serviceable hose of not less than three-quarter inch inside diameter, and a nozzle with an inside diameter of one-quarter inch;

(4) Water, supply, pump, and not less than 250 feet of the hose and the nozzle, as required by this section, must be maintained as a connected, operating unit ready for immediate use at any time;

(5) Internal combustion engines must be equipped with a spark arrester maintained in good condition that meets the standards set forth in the publication of the United States Department of Agriculture, Forest Service, entitled "Standard 5100-1a for Spark Arresters for Internal Combustion Engines," issued March, 1976, except that fully turbocharged internal combustion engines maintained in good condition are exempt from these requirements;

(6) Internal combustion engines must be equipped with one chemical fire extinguisher rated by Underwriters' Laboratories at not less than 4-B.C. The fire extinguisher must be placed on each engine so as to be visible to the operator and ready for instant use. The extinguisher must be equipped with a reliable and easily read pressure gauge; and

(7) All saws must be equipped with a spark-arresting device constructed to retain or destroy 90 percent or more of the carbon particles having a major diameter greater than 0.023 inches (0.584 mm). A spark-arresting device equipped with a woven screen with a maximum opening size of 0.023 inches (0.584 mm), constructed of heat- and corrosion-resistant wire at least 0.013 inches (0.330 mm) in diameter, will be considered in compliance with this requirement, if the total screen opening area is not less than 125 percent of the engine exhaust port area. The unit must be constructed to permit easy removal of the screen for field inspection, replacement, and cleaning.

During periods of high fire danger, PURCHASER may be required to provide a watchman, physically capable of and experienced in operating the firefighting equipment for the operation area. The watchman shall:

(A) be constantly on duty for three hours after the power-driven equipment used by the operator has been shut down for the day;

(B) visually observe all conditions of the operation area on which activity has been in progress; and

(C) have adequate facilities for transportation and communication in order to be able to summon assistance if needed.

During periods of high fire danger, PURCHASER may also be required to work a "hoot-owl" shift.

PURCHASER shall take action on any and all fires, in or near the timber sale area regardless of the origin of the fire. He shall continue suppression action until relieved by an authorized officer of the agency responsible for forest protection or by authorized State personnel.

All fires shall be reported immediately to STATE or to the agency responsible for protection in the area regardless of the size of apparent insignificance of the fire.

STATE may stop all or part of the logging operations of PURCHASER during especially hazardous fire weather.

PURCHASER shall comply with all laws, regulations, and rules promulgated and enforced by the agency responsible for fire protection in the area.

Section 67. Camp Facilities.

(a) PURCHASER shall submit a camp plan to STATE for approval before construction commences.

(b) PURCHASER shall secure all permits necessary from other agencies before construction commences.

(c) Fuel will be supplied by PURCHASER to STATE, at a price to be negotiated, for operation of state vehicles. Shop space will be made available by PURCHASER to STATE for maintenance of these vehicles if it does not interfere with PURCHASER'S operations.

(d) Upon request PURCHASER will furnish STATE with room and board for state personnel at no more than \$30.00 per day.

Section 68. Primary Manufacture. Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974.

For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips are considered to have received primary manufacture.

Section 69. Bond Reduction. Upon notice in writing to STATE by PURCHASER of the completion of all projects required under this contract, and 6 months after acceptance by STATE of all said projects, STATE will authorize a reduction in the amount of the performance bond to 10% of the value of the remaining timber and remaining project costs to the nearest \$100; provided STATE or other party affected by the reduction does not have a claim against PURCHASER.

Section 70. Project Work. PURCHASER shall complete the following projects in accordance with specifications provided in this contract and instructions from STATE. Project locations are shown on Exhibit A unless otherwise stated. PURCHASER shall furnish all material unless otherwise specified.

Project No. 1 Construct primary road between Point "A" and Point "B" according to the specifications in Exhibit "B."

Project No. 2 Construct primary road between Point "B" and Point "C" according to the specifications in Exhibit "B."

Project No. 3 Construct bridges as specified in Exhibits "B" and "D" and as marked on the ground.

Project No. 4 Furnish and install culverts as specified in Exhibits "B" and "C" and as marked on the ground.

Project No. 5 Spread the road rock according to the specifications in Exhibit "B."

Rock Source. The rock may be obtained from the STATE land at the location shown as "Quarry" on Exhibit A, or other locations acceptable to STATE.

Project No. 6 Construct secondary (spur) roads according to the specifications in Exhibit "B."

Section 71. Project Completion. PURCHASER shall complete all projects on a road section before log hauling on that section. However, STATE may waive this requirement if completion will cause damage due to logging operations, provided the section is completed as soon as the cause for the delay is removed. Right-of-Way logs may be removed from a road section before completion.

IN WITNESS WHEREOF, the parties hereto have subscribed their names and affixed their seals as of the date set forth in the first paragraph of this contract.

STATE OF ALASKA

PURCHASER

By _____

Title

By _____

Date

Title

Date

CERTIFICATE OF CORPORATE PURCHASER

I, _____, certify that I am the _____ Secretary of the Corporation named as Purchaser herein and that _____ who signed this contract was then _____ of that corporation; that said contract was duly signed for and in behalf of that corporation by authority of its governing body and is within the scope of its corporate powers.

_____ (Corporate Seal)

**LINDELL, LOG EXPORT RESTRICTIONS OF
THE WESTERN STATES AND BRITISH
COLUMBIA, PACIFIC NORTHWEST FOREST
AND RANGE EXPERIMENT STATION, U.S.
DEPARTMENT OF AGRICULTURE, FOREST
SERVICE (APPENDIX II TO MEMORANDUM OF
LAW BY DEFENDANTS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT, FILED
NOV. 19, 1980)**

1978

USDA Forest Service General Technical Report PNW 63

**LOG EXPORT
RESTRICTIONS OF THE
WESTERN STATES
AND
BRITISH COLUMBIA**

GARY R. LINDELL

APPENDIX II

**Pacific Northwest Forest And Range Experiment Station
U.S. Department of Agriculture
Forest Service
Portland Oregon**

The pros and cons of softwood log exports from the West Coast have been debated for over a decade. Initially, the export market was generally viewed with favor, particularly during the early 1960's as a needed outlet for salvaged timber. But as exports grew with time and accounted for a growing share of the timber harvest, concerns were expressed as to the propriety of allowing the unrestricted export of logs (figs. 1 and 2). In response to these concerns, Alaska, Oregon, California, and Idaho implemented measures on State-owned lands and Federal control regulations were initiated to limit the export of unprocessed timber from lands managed by the U.S. Department of Agriculture Forest Service or the Bureau of Land Management of the U.S. Department of Interior.

This paper presents the main features of log export restrictions imposed by the various State and Federal agencies as well as those of British Columbia as of mid-1977. Where appropriate, some historical background will be given to provide a

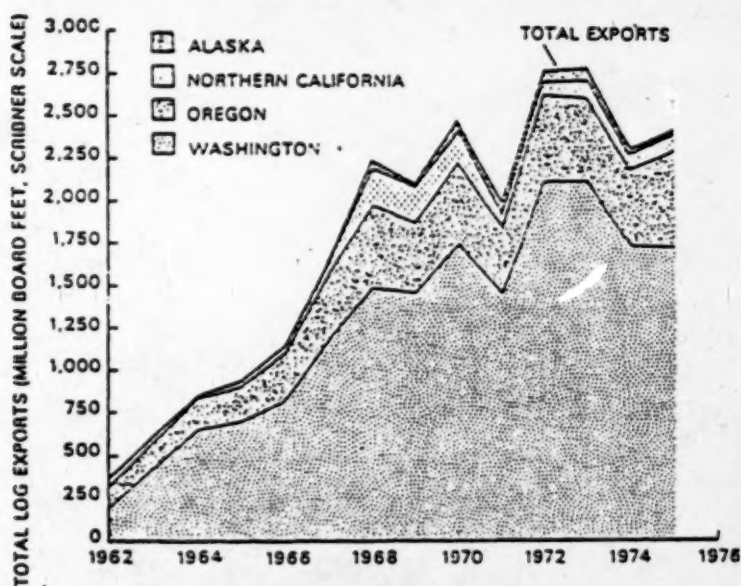


Figure 1.--Softwood log exports from ports in Washington, Oregon, northern California, and Alaska, 1962-75. Source: Ruderznan (1974).

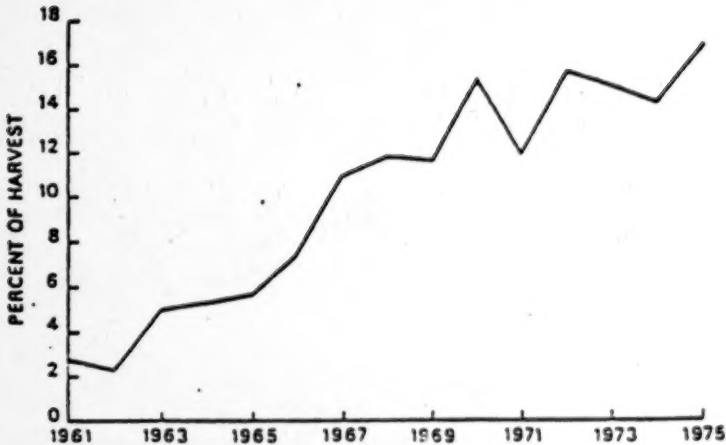


Figure 7.--Softwood log exports as a percent of timber harvest in Washington and Oregon 1961-75. Source: Ruderman (1976).

better perspective as to how present regulations evolved. For additional background, the reader is referred to Austin (1969).

JOINT DETERMINATION BY SECRETARIES OF AGRICULTURE AND INTERIOR

On April 16, 1968, the Secretaries of Agriculture and Interior issued joint determinations concerning log exports from National Forest and Bureau of Land Management lands in western Oregon and western Washington. These stated that a restriction on the volume of logs harvested and exported from Federal lands in unprocessed form was necessary to maintain a viable domestic wood processing industry capable of processing the sustained yield of timber from the selected areas. Authority for the action is contained in the Organic Administration Act of June 4, 1897 (16 U.S.C. 475, 551) in the case of the Secretary of Agriculture. The O and C Act of August 28, 1937 (50 Stat. 874), provided the enabling legislation for the Secretary of the Interior. The volume exported was to be limited to 350 million board feet annually to be divided between Forest Service and Bureau of Land Management lands in the

affected areas.¹ An accompanying plan provided operating and administrative details including the allocation of the limited or "exempt" volume among selected National Forests, the definition of processed products, and exceptions to be allowed such as Port-Orford-cedar which was declared surplus to domestic needs.²

This program was to be in effect until June 30, 1969, at which time it would be subject to review and possible renewal. It was superseded on January 1, 1969 by the Morse Amendment.

MORSE AMENDMENT

Following hearings in 1968, Senator Wayne Morse proposed Part IV of the Foreign Assistance Act of October 8, 1968, (82 Stat. 966) commonly called the Morse Amendment. Taking effect January 1, 1969, the Morse Amendment legislated the same log export quota that had been initiated by the joint determination by the Secretaries of Agriculture and Interior. The area under control, however, was extended to include all Federal lands west of the 100th meridian (a line running through central Texas) including Federal lands in Alaska. The 350 million board feet of exempted volume was jointly allocated to areas administered by the Forest Service or the Bureau of Land Management in Washington, Oregon, and California. The volumes subsequently exported, however, were below the allocated volumes (Austin 1973).

The Morse Amendment also authorized the Secretaries of Agriculture and Interior to issue rules and regulations to prevent the substitution of Federal timber for non-Federal timber

¹ A determination by the Secretary of Agriculture concerning primary processing of timber from National Forests of the Pacific Northwest (unpublished). Specified in the Secretary of Agriculture April 16, 1968 memorandum to the Chief of the Forest Service.

² Plan for requiring domestic primary manufacturing of logs from National Forest land in the Pacific Northwest (unpublished). Response to the April 16, 1968 memorandum of the Secretary of Agriculture.

which had been exported. In 1969 the Forest Service and Bureau of Land Management began exploring ways and means of implementing the substitution clause including the holding of a joint public advisory hearing at Portland, Oregon on September 26, 1969, to obtain comment on a proposed plan. No further action was taken, however.

The Morse Amendment further permitted the Secretaries of Agriculture and Interior to declare certain amounts of unprocessed timber as surplus to domestic needs and thus eligible for export. Such a determination could only be made after the holding of a public hearing to seek advice and counsel as to quantities, species, and grades that might be in surplus. Following public hearings at Portland, Oregon on December 6, 1968, Alaska-cedar was determined to be surplus to domestic needs from Forest Service and Bureau of Land Management lands in Washington, Oregon, and California.

Port-Orford-cedar was also found to be in surplus with the exception of small volumes of select salvage old-growth material which was deemed necessary for the manufacture of arrow shafts and thus ineligible for export. Other than this minor exception, Port-Orford-cedar may be exported in unprocessed form.

A similar hearing at Juneau, Alaska, on May 5, 1969, established that Alaska-cedar and western redcedar were surplus species from Federal lands in Alaska. Consequently these species were freely exportable from these Federal lands and the resulting volumes were in addition to the 350 million board feet of exempted volume.

The Morse Amendment had an expiration date of December 31, 1971. It was extended for an additional 2 years to December 31, 1973, by an amendment to the Housing and Urban Development Act of 1970 (84 Stat. 1817).

APPROPRIATIONS RIDER

In 1972, a combination of factors including an unprecedented housing boom both here and in Japan led to an extremely tight

supply situation for west coast softwood logs. Hearings were held in 1972 and 1973; and several proposals to limit log and/or lumber exports, including those from private lands, were introduced in Congress.

Finally, in October of 1973, Congress attached a rider to the Department of the Interior and Related Agencies Appropriation Act which in effect initiated a complete ban on the export of unprocessed timber from Federal lands in the West. The General Provision attached to the fiscal year 1974 appropriations bill stated:

No part of any appropriation under this Act shall be available to the Secretaries of the Interior and Agriculture for use for any sale hereafter made of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States which will be exported from the United States, or which will be used as a substitute for timber from private lands which is exported by the purchaser—*Provided*, that this limitation shall not apply to specific quantities of grade and species of timber which said Secretaries determine are surplus to domestic lumber and plywood manufacturing needs.³

Thus the provisions imposed by the appropriations rider were generally more restrictive than under the Morse Amendment. The appropriations rider constituted a complete export ban on Federal timber (except for those species and grades declared surplus) compared with a quota of 350 million board feet under the Morse Amendment. In addition, the language of the substitution clause was now directive whereas formerly the Secretaries were only authorized (but not directed) to enact regulations to prevent substitution. On the other hand, the appropriations rider was somewhat less restrictive in that Federal lands in Alaska were no longer included, whereas they were under terms of the Morse Amendment. As will be discussed later, however, log exports from National Forest lands in Alaska are restricted according to the terms of other legislation.

³ Department of the Interior and Related Agencies Appropriation Act, 1974 (P.L. 93-120, October 4, 1973), Sec. 301.

The appropriations rider has been attached to the Interior appropriations acts for each succeeding year (fiscal years 1974 through 1978) and is currently the basis for the complete ban on the export of unprocessed timber from lands administered by the Forest Service and Bureau of Land Management in the West (except Alaska).

The remainder of this section of the report will highlight recent Forest Service and Bureau of Land Management attempts to develop regulations to implement the terms of the rider to agency appropriations.

FOREST SERVICE

On October 26, 1973, the Forest Service published proposed regulations in the Federal Register and, based on comments received, Title 36 of the Code of Federal Regulations was revised to incorporate regulations prohibiting the export of unprocessed National Forest timber or its substitution for exported private timber. The effective date was March 13, 1974. These are the regulations currently in force; the more important provisions are as follows:⁴

1. *Unprocessed timber* does not include pulp (utility) grade logs and Douglas-fir special cull logs. In addition, the following are defined as having been processed and thus eligible for export.
 - a. lumber and construction timber sawn on four sides,
 - b. chips, pulp and pulp products,
 - c. green veneer and plywood,
 - d. poles and piling cut or treated for use as such,
 - e. cants cut for remanufacture, 8-3/4 inches in thickness or less.
2. *Substitution of public timber for private timber* which is exported occurs "when with respect to historic levels, (1) the purchaser continues to export and increases his purchase of National Forest timber, or (2)

⁴ Code of Federal Regulations, Title 36, Chapter II, Part 223.10.

the purchase of National Forest timber continues while the purchaser increases his export of unprocessed timber from private lands tributary to the plant for which National Forest timber covered by a specific contract is expected to be delivered." "Private lands" does not include lands managed by other Federal or State agencies or lands held in trust by the United States for Indians. The term "historic level" means 110 percent of the average annual volume of Federal timber purchased or exported during the calendar years 1971, 1972, and 1973. Thus, an individual is substituting National Forest timber for exported private timber if for a calendar year, and with reference to his historic level, he increases his export of private timber while continuing to purchase National Forest timber in a particular timbershed or he continues to export and increases his purchase of National Forest timber. Also, an increase in export of private timber is prohibited by contractual terms during any calendar year in which National Forest timber is harvested, if the National Forest timber was purchased pursuant to the above limitation.

3. *Surplus species* of timber are not bound by the regulations and are freely exportable. At present Port-Orford-cedar and Alaska-cedar are classified as surplus; following public hearings, the Secretary of Agriculture may declare additional species, grades, or quantities of timber as surplus to domestic needs. In addition, sales having an appraised value of less than \$2,000 are not bound by the export of substitution regulations.

The above regulations took effect in March of 1974 and have had only minor modifications since that time. In October 1975, the Forest Service responded to a request from a timber owner in the lower Columbia River area and solicited comments on the possibility of holding a public hearing to determine if specific quantities of western hemlock might be found surplus to domestic needs. The majority of the respondents opposed such a hearing and, as a result, no further consideration was given to adding western hemlock to the list of surplus species.

⁶ Code of Federal Regulations, Title 36, Chapter II, Part 223.10(e).

In April 1976, the Forest Service tried to standardize procedures for the holding of a public hearing to consider the question of surplus species. Two alternatives were offered.

One alternative required that proponents submit a thoroughly documented request supporting the conclusion that a particular species or grade is surplus. The Secretary would then file notice in the Federal Register asking for comments. Based on these, a decision would be made on the necessity for holding a public hearing.

The second alternative would involve an analysis of no-bid sales to determine which species or species groups were involved. Public hearings would be scheduled if the analysis indicated a surplus.

Public response favored the first alternative. Therefore, the Forest Service will use this procedure to determine if a class of material is surplus to domestic needs. No regulation change was required and none was made.

Also in April 1976, in response to a request by the House Committee on Appropriations, the Forest Service solicited comments on a proposed rule change governing the distinction between processed and unprocessed timber. Three alternative definitions were offered which bracketed the current definition of cants. One alternative would require that all material be completely sawn on four sides to qualify as processed. A second alternative would allow a limited amount of wane as permitted under "Export R" rules, of the Pacific Lumber Inspection Bureau (1971), and the third alternative would permit export of cants of any thickness. The first two alternatives would in effect eliminate the export of "waney" cants whereas the third is less restrictive than current practice.

The response favored continuance of the current definition; consequently, there are no plans for further efforts to revise the definitions of cants. A cant 8-3/4 inches in thickness or less meets current processing requirements.

BUREAU OF LAND MANAGEMENT

On June 6, 1975, the Federal Register contained notice that the Bureau of Land Management intended to amend the relevant parts of Title 43 of the Code of Federal Regulations to conform with the appropriations rider forbidding the export or substitution of Federal timber. Final regulations were published the following March 26, with an effective date of April 1, 1976. Subject to a minor amendment noted below, these regulations are currently in effect. The more important provisions are as follows.⁶

1. *Unprocessed timber* includes any logs except those of utility grade or below, split or round bolts not processed and suitable for end product use and cants or squares to be remanufactured exceeding 8-3/4 inches in thickness. The maximum size of an acceptable cant was simply a clarification of the earlier definition which described them as a "nominal" 8 inches which meant they could range up to 8-3/4 inches in size. The current definition of unprocessed timber is thus the same as that adopted by the Forest Service.
2. *Substitution* was defined as "the purchase of a greater volume of Federal timber by an individual purchaser than has been his historic pattern within twelve (12) months of the sale of export by the same purchaser of a greater volume of his private timber than has been his historic pattern during the preceding twelve (12) months, exclusive of Federal timber purchased by negotiated sale for right-of-way purposes."⁷

This means that a purchaser is substituting Federal timber for private exported timber if, with respect to his historical pattern, he increases *both* his purchase of Federal timber and export of private timber. His historical pattern is established from the date of his last export sale and includes the volume of Federal

⁶ Code of Federal Regulations, Title 43, Chapter II, Parts 5400, 5420, and 5450.

⁷ Code of the Federal Regulations, Title 43, Chapter II, Part 5400.0-5(n).

timber purchased and the volume of private timber exported for the 12-month period prior to this date. Substitution is determined by monitoring his purchase and export activities for the 12-month period following the above date. For example, assume that a purchaser's last export sale was June 1, 1977. His purchase and export activity for the period June 1, 1976 to June 1, 1977, thus establishes his historical pattern. Assume further that his purchase of Federal timber this period was 100 million board feet and his export sales totaled 40 million board feet. Substitution could then be illustrated by the activity over the succeeding 12-month period (June 1, 1977 to June 1, 1978).

	Federal timber purchases	Private timber exports	Substitution
	—Million board feet—		
Historical pattern (6/1/76 - 6/1/77)	100	40	—
Purchaser activity	100	40	No
at various levels	110	40	No
(6/1/77 - 6/1/78)	100	50	No
	110	50	Yes

During subsequent implementation of the substitution regulations, the Bureau of Land Management decided that further clarification of the area under consideration for administering the substitution clause was required. Since about 95 percent of Bureau of Land Management timber harvest originates in western Oregon, it was thought that this adequately defined the market area. The Agency subsequently decided that the area under consideration should be more closely tied to utilization facilities; and in August 1976, the definition of substitution was amended accordingly. The current Bureau of Land Management definition of substitution is thus:

- (1) The purchase of a greater volume of Federal timber by an individual purchaser than has been his historical pattern within twelve (12) months of the sale of export by

the same purchaser of a greater volume of his private timber than has been his historic pattern during the preceding twelve (12) months, exclusive of Federal timber purchased by negotiated sale for right-of-way purposes, and (2) the increase of both the purchase of Federal timber and export of timber from private lands tributary to the plant for which Bureau of Land Management timber covered by a specific contract is expected to be delivered.⁸

The first part of the definition pertains to an individual's purchase and export activity relative to his historical pattern; the second part establishes the market area. "Federal timber" means timber sold by the Bureau of Land Management. Timber sold for right-of-way purposes is subject to the export ban but not the substitution restrictions. The Bureau of Land Management definition of marketing areas is thus identical to that used by the Forest Service. The Forest Service definition of substitution is more restrictive, however, in that a continuation in purchases or export with an increase in either constitutes substitution whereas the Bureau of Land Management definition specifies an increase in both purchases and exports.

3. *Surplus species* may be designated by the Secretary of the Interior as available for export following public hearings authorized by the Director of the Bureau of Land Management to seek advice and counsel as to the specific grades and species that might be surplus to domestic needs. Port-Orford-cedar and Alaska-cedar have been so designated.

NATIONAL FORESTS IN ALASKA

Federal lands in Alaska are not included under the provisions of the appropriations rider pertaining to log exports; the provisions apply only to the contiguous 48 States. Since 1928, however, the Forest Service has limited the export of unprocessed logs from National Forests in Alaska under general authority granted by the Organic Administration Act of June 4, 1897 (16 U.S.C. 475, 551).

⁸ Code of Federal Regulations, Title 43, Chapter II, Part 5400.0-5(n).

Forest Service policy on limiting the export of logs was established by way of Secretary's approval of a memorandum from W. B. Greeley, Chief Forester, dated January 6, 1928. Subsequent regulations stated that no timber harvested from National Forests in Alaska may be exported in unprocessed form from Alaska without the prior consent of the Regional Forester. The primary processing requirement was imposed to insure the development and continued existence of adequate wood processing capacity essential for the utilization of timber from the State's National Forests. This constraint is more restrictive than those commonly in effect elsewhere, in that it not only forbids export of unprocessed timber from Alaska to overseas markets but also to domestic markets in other States.

Although timber from National Forests in Alaska may be exported with the consent of the Regional Forester, the regulations impose other restrictive factors that he must consider in making such a decision. Among other things, he must consider whether such export will:

- (1) permit a more complete utilization of material on areas being logged primarily for products for local manufacture, (2) prevent loss or serious deterioration of logs unsalable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, or fire, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet national emergencies or to meet urgent and unusual needs of the Nation.⁹

Species surplus to domestic needs and otherwise meeting any of these requirements are eligible for export following approval by the Regional Forester on a case-by-case basis.

Federal lands in Alaska did not share in the exempted volume granted under the provisions of the Morse Amendment. Following a public hearing on May 5, 1969, in Juneau, western redcedar and Alaska-cedar were, however, declared surplus to domestic needs and thus eligible for export; annual

⁹ Code of Federal Regulations, Title 36, Part 223.10(i).

exports from National Forest lands have averaged about 9 million board feet since then. In 1975, 13.5 million board feet of logs were exported and of this 58 percent was Alaska-cedar, the remainder western redcedar.¹⁰

By mid-1976 there were indications that surpluses of western redcedar were decreasing. Before considering export application, the Forest Service began to require proof that logs had been first offered for sale to domestic manufacturers. Following a public hearing, the Forest Service on November 18, 1976, established that western redcedar was no longer in surplus and thus would be exportable only if the processing requirements were met. This decision was appealed and subsequently reversed on September 26, 1977, for the area included in the long-term sale to the Ketchikan Pulp Company. Other than this exception, western redcedar may not be exported in unprocessed form from National Forest lands in Alaska. Alaska-cedar remains in surplus and thus exportable with permit.

The definition of primary manufacture for timber from National Forest sales in Alaska is the same as that employed on National Forest lands elsewhere. Cants not thicker than 8-3/4 inches meet the definition of primary manufacture. Green veneer and poles and piling are considered manufactured and thus eligible for export. Primary manufacture in the case of pulp manufacture means the breakdown process to that point where the wood fibers have been separated.

As a result of regulations published on December 5, 1977, chips are also considered as receiving primary manufacture. Formerly, chips could be exported only if manufactured from logging and milling waste, but not from roundwood. The objective of the revised regulation was to provide firms in Alaska with *marketing alternatives* for logs which are not suitable for sawing.

¹⁰ Information provided by Office of Regional Forester.

BUREAU OF LAND MANAGEMENT LANDS IN ALASKA

The Bureau of Land Management does not have an ongoing timber sale program in Alaska pending settlement of the Alaska Native Claims Settlement Act of 1971 (P.L. 92-203). The few small sales that are made are only for local, domestic needs. Consequently, no regulations have been written pertaining to the export of logs from Bureau of Land Management lands.

BUREAU OF INDIAN AFFAIRS

The Department of the Interior ban on log exports does not apply to lands managed on behalf of the Indians. Individual reservations may, however, impose such restrictions should they wish. As far as is known, none exists at this time.

There is one area of land managed on behalf of the Indians from which unprocessed timber may not be exported. This is an area of 61,360 acres known as the "McQuinn Strip," which borders on the north and west sides of the Warm Springs Reservation of Oregon. Ownership of the strip was disputed for many years because of an earlier contested survey. Finally, in 1972, title to the former Federal land which formed parts of two National Forests was ceded to the Confederated Tribes of the Warm Springs Reservation of Oregon.

The act¹¹ which transferred title to the land contained language which in essence was designed to retain existing marketing patterns for timber from the Strip until January 1, 1992. Among other things, the act specified that timber from the Strip must be designated for primary manufacture in the United States. In administering the act, the Bureau of Indian Affairs has adopted the Forest Service definition of processed versus unprocessed timber to define primary manufactured items, i.e., lumber, chips or pulp, green veneer, poles and piling, or cants 8¾ inches in thickness or less.

¹¹ Act of September 21, 1972 (P.L. 92-427, S. 2969).

STATE OF ALASKA

Since 1960, the State of Alaska has had primary manufacturing requirements on timber flowing from State-managed lands and destined for export from the State. Subject to approval of the Commissioner of Natural Resources, limited amounts of round logs (except spruce and hemlock) may be exported for experimental purposes such as to pilot test a new product. Other than this minor exception, unprocessed logs may not be exported.

Cants are considered to have received primary manufacture when sawed to a maximum thickness of 12 inches. Timber cut thicker than 12 inches must be squared on four sides with a wane allowance of up to one-third of each dimension (thickness and width). Thus, squares of any thickness are considered to have received primary manufacture.

The most recent Policy Statement on Primary Manufacture, issued in May 1974, was intended to ease restrictions pertaining to the export of chips.¹² Prior to that time chips were considered to have received primary manufacture and thus were eligible for export only when processed from logging or mill residues having no local market. The policy initiated in 1974 permitted the export of chips produced from surplus roundwood from interior Alaska.¹³ As before, chips from southeast Alaska may be exported only when produced from logging or mill residues.

Primary processing definitions for other products are similar to those for National Forest lands. In the case of pulp manufacture, primary processing is the point at which the fibers have been separated (other than the special case for chips discussed above). Green veneer and poles and piling meet primary processing requirements and are permissible for export.

¹² State of Alaska. Policy Statement on Primary Manufacture, May 7, 1974. Timber Sale Regulations, Section 76-130.

¹³ Areas west of 141° longitude.

STATE OF WASHINGTON

The State of Washington imposes no restrictions on export of timber from lands managed by the State. The most recent referendum was in 1968 when State voters defeated Initiative Measure No. 32 which would have required that all timber from State-managed lands receive primary manufacture within the State. In 1974, about 22 percent of the logs shipped by log export operations within the State originated from State-managed lands (Bergvall et al. 1975).

STATE OF OREGON

By an emergency act passed in 1963, the State of Oregon determined that all timber sold by the State or any of its political subdivisions must receive primary processing in the United States unless the State Department of Forestry has granted an export permit.¹⁴ Primary processing was defined by the act as "that stage of manufacture next beyond the log form of said timber."¹⁵ Port-Orford-cedar was exempted from the regulation.

The State Forester is empowered to issue an export permit if, after public hearings, the applicant has demonstrated that the timber is currently in log form and that there is no economic domestic market for the timber. The applicant must in good faith solicit offers from domestic processors within economic transportation distance, and show that such offers do not provide a profit above the minimum stumpage prices for the sale allowing for the costs of logging and transporting the logs to their current site. The State Forester was previously required to obtain the advice of an Advisory Committee on Foreign Processing, but this committee was abolished by the 1977 Oregon Legislature.

¹⁴ State of Oregon. Sale and processing State-owned timber. Chapter 298, Oregon Laws 1963.

¹⁵ Ibid., ORS 526.805.

Apparently the effect, if not the intent, of the regulations has been essentially a total ban on the export of logs from State-managed lands. Since the regulations went into effect in 1963, only 10 applications for export permits were received by the Forestry Department and of these only three were granted.¹⁶ Total volume for the three permits that were granted was less than 2 million board feet.

STATE OF CALIFORNIA

Through regulations promulgated in 1974, the State of California directed that unprocessed timber from State-managed forests shall not be sold either directly or indirectly to a primary manufacturer located outside the United States.¹⁷ Timber was deemed to have received primary manufacture when it was sawn on four sides and did not exceed 4 inches by 12 inches.

In addition to forbidding the foreign export of unprocessed timber from State-managed forests, the regulations further specified that State timber could not be substituted for timber that was exported from private lands.¹⁸ "Substitution" in this case means the replacement of State timber for unprocessed timber which is exported from lands owned or under the control of the purchaser within California and located no more than 200 miles from the sale boundary from where the State timber was removed. Purchasers of State timber are required to execute an agreement with the State Forester to this effect as a condition of sale. Furthermore, the purchaser must notify the State Forester of all locations of State timber until such time as the timber has received primary processing. Should the timber be resold prior to primary processing, the same substitution regulations are to be imposed on the new purchaser.

¹⁶ Information provided by Office of State Forester.

¹⁷ State of California. Public resources code, Section 4650.1.

¹⁸ State of California. Administrative code, Sections 1510-1521.

STATES OF IDAHO AND MONTANA

Small volumes of softwood logs normally flow from the Montana Customs District into Canada each year. The Montana Customs District includes all ports in Montana and Idaho. Montana imposes no restrictions on the export of unprocessed timber; Idaho does.

State of Idaho restrictions on the export of unprocessed timber cut from State-managed lands were tied to the original timber sale authority granted to the State Board of Land Commissioners. When granted timber sale authority, the Board was required to prescribe that timber cut from lands managed by the State must be manufactured into lumber or timber products within the State.¹⁹ The authority further specified that the sale of State timber for the manufacture of wood pulp was excepted from this provision.

Subsequent rulings have affirmed the provision that State timber must receive primary manufacture before it may be exported from the State. Unpeeled cedar poles and rough, green lumber have been classified as manufactured and are eligible for export.²⁰ Cants may be of any size and may be exported out of State provided they are not destined for subsequent remanufacture within facilities of the *same* company. Cants may be exported and sold to *another* company for subsequent remanufacture.

BRITISH COLUMBIA

In British Columbia, the Provincial and Federal governments share control over log exports; the Provincial government has authority over its natural resources, whereas the Federal government has jurisdiction over international trade. In practice, the two cooperate to insure that essentially all timber cut within the Province is subject to the same export controls.

¹⁹ State of Idaho. Idaho code, Section 58-403.

²⁰ Information provided by Idaho Department of Lands.

Provincial control over log exports dates from March 12, 1906, with the passage of the Forest Act.²¹ Part X of the Act stipulates that all timber cut on lands subject to Provincial control shall be used in the Province or manufactured in the Province. Lands under Provincial control include all Crown lands at the time of the passage of the Act as well as all lands granted after March 12, 1906.

Federal authority to control exports is contained in the Export and Import Permits Act²² and is extended to all log exports from the Province, even those from private lands. The Federal government, however, has, in essence, delegated log export control authority to the Province in the case of Provincial lands while retaining control over all remaining lands. The remaining lands include Federal lands, such as Indian reserves, and lands Crown-granted before 1906 which include the bulk of the private lands. Although the original intention of the Provincial and Federal controls varied, recent (1974) amendments to the Export and Import Permits Act have brought Federal objectives into conformance with those of the Province. The expressed objective of export control by both levels of government is now the promotion of natural resource manufacturing in Canada (Royal Commission on Forest Resources 1976).

Controls are implemented by prohibiting export of any unprocessed timber except that authorized under individual permits issued by the Provincial Lieutenant Governor in Council, and by the Federal Minister of Industry, Trade, and Commerce. Unprocessed timber includes that not meeting wane limitations as permitted on No. 3 common (utility) lumber under the Export "R" list (Pacific Lumber Inspection Bureau 1971). Chips also must receive permit for export.

²¹ Now called the Department of Forests Act, S.B.C. 1960, c 153, as amended.

²² Export and Imports Permit Act, R.S.C. 1970, C. E-17, as amended.

The Provincial Lieutenant Governor in Council and the Federal Minister of Industry, Trade, and Commerce are advised on log export applications by the Log Export Advisory Committee which consists of members of various industry groups and the relevant government official who serves as chairman. The Committee actually serves a dual purpose: To advise on permit applications subject to Provincial control and to advise on permits subject to Federal purview.

To render an affirmative decision, the Log Export Advisory Committee must establish the fact that the logs in question are surplus to the needs of domestic mills. To establish this fact, the applicant must advertise his logs according to specified procedures, following which he submits a formal application. Although the Log Export Advisory Committee has only an advisory role, its recommendations are generally adopted by the Provincial Cabinet and/or the Federal Minister of Industry, Trade, and Commerce.

The Chip Export Advisory Committee functions in a parallel fashion to the Log Export Advisory Committee and advises on export applications for wood residues. The committee is chaired by a member of the Council of Forest Industries, an industry association, and is composed of industry, producer, and consumer groups with governmental officials acting as observers. As with the case of log export applications, the committee must determine if an application for chip export represents supplies surplus to domestic needs. The recommendations of the Chip Export Advisory Committee are generally accepted by the Provincial Minister and Federal approval is routinely granted on top of Provincial approval.

In 1975, log exports totaled 150 thousand cunits or less than 1 percent of total harvest within the Province (Government of British Columbia, Forest Service 1976). Of this, 51 percent was exported under permit granted by the Provincial and Federal governments; the remainder was exported under permit granted solely by the Federal government.

TIMBER TAX

Exporters of timber or chips who have been granted permits subject to Provincial controls are also subject to a "timber tax" levied on the products. The level of the tax is established by the Lieutenant-Governor with the advice of the Executive Council and the Minister of Forests. By an order dated March 3, 1977, the levy on chips of \$1.50 per bone dry unit was deleted. Structured tax rates employed for logs have, however, been essentially the same since May 1974. They include \$2 per cunit for low-grade pulpwood, \$5 per cunit for cottonwood, \$40 per cunit for cypress, and \$10 per cunit for all other species (Royal Commission on Forest Resources 1976).

DISCUSSION

This survey indicates that fairly rigorous controls are exercised on log exports from public lands in the west coast area. As a result of combined Federal and State regulations in Alaska and the almost complete absence of private ownership of forest land, virtually all timber harvested in that State is subject to export regulations. A similar situation exists in the Province of British Columbia where all export of timber is subject to the approval of the Dominion Government.

In the remaining coastal States the proportion of total harvest affected by State or Federal export regulations varies somewhat. In the State of Washington only timber from National Forest and Bureau of Land Management lands is prohibited from export (no controls are imposed on State-managed lands). Together these accounted for less than 20 percent of the total harvest in 1975 (table 1). In California, the proportion of total harvest prohibited from export was about 37 percent while in Oregon, National Forest, Bureau of Land Management, some Indian lands, and State-managed lands were included which together supplied nearly half of the State harvest. For the combined three-State area, slightly over one-third of the 1975 timber harvest was directly prohibited from export by either Federal or State controls. An even larger, but

unknown, proportion of the harvest is affected when the possible impacts of the substitution regulations on private initiatives are considered. A private individual or company might be reluctant to export its timber if it jeopardized its potential supply of public timber.

No attempt will be made here to analyze the domestic effects of these constraints. Some analysis of the effect of softwood log exports on domestic employment has been made by Darr (1975), and Haynes (1976) has examined the price impacts of log export restrictions on domestic lumber and stumpage markets.

Further analysis will be required to assess the probable impact of these controls on the quantity of timber actually entering the export trade. The language of a restriction can be quite strict; but when related to the affected areas, it might have little impact on the quantity of timber available for export or the quantity actually exported. This would depend on additional aspects of supply such as total volumes affected, location, species, and grades as well as on the overriding importance of the characteristics of both domestic and foreign demand.

Table 1—Proportion of total timber harvest prohibited from export by direct Federal or State controls for Washington, Oregon, and California 1975

State	Total timber harvest by State	Portion of total harvest prohibited from export by Federal controls		Portion of total harvest prohibited from export by State controls		Portion of total harvest prohibited from export by Federal or State controls	
		million board feet	percent	million board feet	percent	million board feet	percent
Washington	6,185	1,099	17.8	—	—	1,099	17.8
Oregon	7,371	3,305	44.8	160	2.2	3,465	47.0
California	4,334	1,569	36.2	35	0.8	1,604	37.0
Total	17,890	5,973	33.4	195	1.1	6,168	34.5

Source: Ruderman (1976)
California Division of Forestry (1976)
Lloyd (1976, 1977)

Table 2 provides a comparison of some of the more important provisions of the log export and substitution restrictions for Federal, State, and Provincial jurisdictions.

Table 2—Comparison of log export restrictions

Geographic area	Lands affected	General limitations	Exemptions	Definition of primary processing	Definition of Substitution
All areas west of 100th meridian in contiguous 48 States.	National Forests	No export of unprocessed National Forest timber nor substitution for timber exported from private lands.	Port-Orford-cedar, Alaska cedar. Sales having appraised value less than \$2,000.	Cants 8-3/4 inches in thickness or less, lumber and squares, chips & pulp, green veneer and plywood, poles and piling.	With respect to historical levels, the purchaser continues to export and increases purchase of National Forest timber, or increases export of private timber while continuing purchase or harvest of National Forest timber.
All areas west of 100th meridian in contiguous 48 States.	Bureau of Land Management	No export of unprocessed BLM timber nor substitution for exported private timber.	Negotiated right-of-way timber sales. Port-Orford-cedar. Alaska-cedar.	Cants and squares 8-3/4 inches in thickness or less, lumber, chips and pulp, green veneer and plywood, poles and piling.	With respect to historical pattern both purchase of BLM timber and export of private timber increase.
Alaska	National Forests	No export of unprocessed timber from State.	Alaska-cedar. Western redcedar on long-term sale to Ketchikan Pulp Company.	Cants 8-3/4 inches in thickness or less, green veneer, poles and piling, pulp, and chips.	NA
Alaska	State of Alaska	No export of unprocessed timber from State.	With prior approval, small volumes of all species except spruce and hemlock may be exported for experimental purposes.	Cants 12 inches or less in thickness; squares any thickness with one-third each dimension (thickness and width) allowed in waste; chips from logging and mill waste; chips from roundwood in interior Alaska.	NA
Oregon	State of Oregon	Export of unprocessed timber by permit only based on unavailability of domestic markets.	Port-Orford-cedar	That stage of manufacture next beyond the log form.	NA

Table 2—Comparison of log export restrictions—continued

Geographic area	Lands affected	General limitations	Exemptions	Definition of primary processing	Definition of Substitution
Oregon	McQuinn Strip portion of Warm Springs Reservation	Until January 1, 1992, timber from the McQuinn Strip must be designated for primary manufacture in the U.S.	None	Lumber, chips or pulp, green veneer, poles and piling cants 8-3/4 inches in thickness or less.	NA
California	State of California	No export of unprocessed timber nor substitution of State timber for timber exported from private lands.	None	Squares not exceeding 4 inches x 12 inches	Replacement of State timber for timber exported from private land within 200 miles of State timber sale area.
Idaho	State of Idaho	State timber must receive primary manufacture within State.	Pulpwood	Cants provided not subsequently remanufactured out-of-State by same firm; lumber, poles.	NA
British Columbia	All lands	Export of unprocessed timber or chips from Province only by permit based on surplus. Export tax on Provincial logs.	None	Lumber meeting waste requirements for No. 3 Common (Utility) under Export "R" list.	NA

NA — not applicable.

SUPPLEMENTAL AFFIDAVIT OF H. SUGIYAMA
(FILED DEC. 3, 1980)

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Attorneys for Plaintiff
SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

V.

ROBERT LERESCHE, Commissioner of Department of
Natural Resources of the State of Alaska;
GEOFFREY HAYNES, Director, Division of Lands,
Department of Natural Resources, and Deputy Commissioner
of Department of Natural Resources of the State of Alaska;
and

**THEODORE G. SMITH, Director of Division of Forest,
Land and Water Management, of Department of Natural
Resources of the State of Alaska,**

Defendants.

RECEIVED

DEC 3 1980

Burr, Pease & Kurtz, Inc._____

SUPPLEMENTAL AFFIDAVIT OF H. SUGIYAMA

STATE OF ALASKA)
) ss.
JUDICIAL DISTRICT)

H. SUGIYAMA, upon being first duly sworn, deposes and states as follows:

1. That I am Vice President of SOUTH-CENTRAL TIMBER DEVELOPMENT, INC., and am familiar with Alaska timber harvesting, utilization and export conditions.

2. That I have reviewed the report of *Production, Prices, Employment, and Trade In Northwest Forest Industries, First Quarter 1980*, Florence K. Ruderman, which is published by the United States Department of Agriculture, Forest Service, Pacific Northwest Forest and Range Experiment Station. This report shows that during years 1969 through 1979 the volume of softwood lumber (principally hemlock and spruce) which was exported from Alaska to foreign countries (principally Japan) ranged between a low of 237,795,000 board feet to a high of 404,849,000 board feet. It shows, also, that the 1979 volume was 278,462,000 board feet. Attached hereto is page 38 of that report which details these figures. Also, attached is page 27 of the report which shows the dollar volumes of such exports.

3. When compared to the volume of timber exported to foreign countries, the volume of Alaska timber which is utilized within Alaska is extremely small.

4. Within the South-Central/Gulf of Alaska area there is very little local market for Alaska lumber products. Any substantial sawlog operation utilizing Alaska logs from this area will necessarily sell the bulk of its products to Japan and other foreign countries.

5. It is also my observation that within Alaska there is absolutely no market for domestic resawing of "cant" or "square" manufactured to State of Alaska specifications. In other words, a cant or square manufactured in Alaska would be virtually unsaleable within local Alaska sawmill markets. The reasons are:

A. Any sawmill would prefer round logs for its sawmill operations and the small volume of round logs required would be readily available locally.

B. Round logs are preferable because they can be stored in the water and moved in the water, whereas cants must be transported on land.

C. Once a log is placed on the sawmill carriage and the costs of getting it there have been incurred, it produces more lumber for the costs involved than does a cant.

D. Also the round log is much less subject to deterioration from weather and outside conditions.

6. South-Central had experience with attempting to make a sale of cants inside the State of Alaska. We had some cants at Jakalof Bay which were manufactured to State specifications, but which were not loaded aboard ships during that season. We attempted to market those cants to a sawmill in Anchorage, but found that just costs of transporting the cants from Jakalof Bay to Anchorage exceeded the highest possible sales price of the cants. Accordingly no sale was made.

7. Based on the above statements and my observations of the Alaska timber industry, it is my firm conclusion that a cant or a square manufactured to State of Alaska primary manufacture specifications is marketable only in foreign commerce and cannot be sold for use within Alaska. It is also my firm conclusion that no sawmill in Alaska will manufacture a cant or square for any domestic Alaska market.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated this ____ day of December, 1980.

/s/ H. Sugiyama

H. SUGIYAMA

SUBSCRIBED and SWORN to before this ____ day of _____, 1980.

Notary Public for Alaska

My commission expires: _____

**Table 14—Volume and average value of softwood log exports
from Alaska ports by destination, 1969-80**
(Volume in thousand board feet, Scribner scale; value in
dollars per thousand board feet)

YEAR AND QUARTER	VOLUME	AVERAGE VALUE
TO ALL COUNTRIES		
1969	31,889	118.95
1970	51,531	125.58
1971	42,600	116.54
1972	65,837	125.88
1973	71,719	248.23
1974	34,949	240.82
1975	29,011	307.97
1976	26,197	224.59
1977	52,377	263.54
1978	68,025	320.45
1979—		
1st quarter	15,830	385.25
2d quarter	27,656	515.86
3d quarter	34,144	433.10
4th quarter	50,967	498.60
1979 total and average value	128,597	470.97
1980—		
1st quarter	26,021	475.33
2d quarter		
3d quarter		
4th quarter		
1980 total and average value		

TO JAPAN		
1969	30,889	121.79
1970	47,583	129.67
1971	38,948	120.94
1972	61,882	129.99
1973	71,706	248.24
1974	29,088	252.71
1975	24,311	352.29
1976	20,741	253.18
1977	46,897	278.99
1978	57,653	343.49
1979—		
1st quarter	14,473	388.56
2d quarter	25,744	503.61
3d quarter	33,980	433.60
4th quarter	46,606	511.53
1979 total and average value	120,753	475.21
1980—		
1st quarter	25,223	472.33
2d quarter		
3d quarter		
4th quarter		
1980 total and average total		

Source—U.S. Department of Commerce. The valuation definition used in the export statistics is the value at the seaport or border port of exportation. It is based on the selling price (or cost if not sold) and includes inland freight, insurance, and other charges to the port of exportation. Data are compiled from Department of Commerce records at the end of each quarter.

Table 25—Softwood lumber exports from Alaska ports, by species and destination, 1969-80
(In thousand board feet)

Year and Quarter	Total	Western Hemlock	Sitka Spruce	Cedar	Other Softwoods
TO ALL COUNTRIES					
1969	285,894	57,235	228,659	0	0
1970	315,586	90,974	219,011	708	4,893
1971	247,414	92,243	155,171	0	0
1972	340,196	155,407	184,649	0	140
1973	404,849	210,555	194,143	12	139
1974	362,432	205,144	154,525	2,641	122
1975	313,307	179,398	132,556	1,353	0
1976	290,011	134,387	148,526	1,298	5,800
1977	250,044	122,544	121,350	5,579	571
1978	237,795	126,218	111,435	53	89
1979—					
1st quarter	90,668	57,439	22,926	303	0
2d quarter	75,811	42,578	32,719	29	485
3d quarter	64,229	35,898	28,306	0	26
4th quarter	57,754	36,090	19,894	147	1,623
1979 total	278,462	172,005	103,844	479	2,134
1980—					
1st quarter	66,402	43,514	22,888	0	0
2nd quarter					
3d quarter					
4th quarter					
1980 total					

TO JAPAN

1969	285,432	57,235	228,197	0	0
1970	315,386	90,774	219,011	708	4,898
1971	245,974	91,357	154,617	0	0
1972	336,798	152,555	184,243	0	0
1973	403,988	210,536	193,390	12	0
1974	361,691	204,845	154,206	2,641	0
1975	312,976	179,122	132,501	1,353	0
1976	289,197	134,274	148,221	902	5,800
1977	245,445	122,471	121,083	1,391	500
1978	236,615	125,355	111,207	53	0
1979—					
1st quarter	80,653	57,439	22,926	288	0
2d quarter	72,673	40,722	31,961	0	0
3d quarter	62,614	35,898	26,716	0	0
4th quarter	57,675	36,090	19,815	147	1,623
1979 total	273,615	170,149	101,408	435	1,623
1980—					
1st quarter	63,403	41,507	21,896	0	0
2d quarter					
3d quarter					
4th quarter					
1980 total					

Source—U.S. Department of Commerce. Data are compiled from Department of Commerce records at the end of each quarter.

**MEMORANDUM AND ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF ALASKA (ENTERED JAN. 5, 1981)**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

No. A80-311 Civil

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of Natural Resources of the State of Alaska; GEOFFREY HAYNES, Director, Division of Natural Resources, and Deputy Commissioner of Department of Natural Resources of the State of Alaska; and THEODORE G. SMITH, Director of Division of Forest, Land and Water Management, of Department of Natural Resources of the State of Alaska,

Defendants,

KENAI LUMBER COMPANY,

Intervenor.

FILED

January 5, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

By _____ Deputy

MEMORANDUM AND ORDER

VON DER HEYDT, Chief Judge.

THIS CAUSE comes before the court on cross motions by plaintiff and defendant for summary judgment, and defendant-intervenor's motion to dismiss. The parties agree that the sole issue to be decided is whether the State's requirement of primary manufacture violates the Commerce Clause of the

United States Constitution.¹ As the matter in controversy exceeds the sum of \$10,000, this court has jurisdiction pursuant to 28 U.S.C. § 1331(a).

I. FACTS

In September, 1980, the State of Alaska gave notice that it would sell approximately 49,185,000 board feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of the sale provided, pursuant to 11 A.A.C. § 76.130,² that "primary

¹ U.S. Const., art. I § 8 provides in relevant part: "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several states"

² 11 A.A.C. § 76.130 (1974) provides:

PRIMARY MANUFACTURE

- (a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.
- (b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means
 - (1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or
 - (2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).
- (c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

Authority: AS 38.05.080
 AS 38.05.110
 AS 38.05.115
 AS 38.05.120

manufacture within the State of Alaska will be required as a special provision of the contract." The inclusion of the primary manufacture requirement in the timber sales contract requires a successful bidder to pre-cut the sale timber in Alaska prior to export.

Plaintiff South-Central Timber Development, Inc. (South-Central) is an Alaskan corporation engaged in the business of purchasing Alaska standing timber, logging such timber, and shipping the resulting logs into foreign commerce. Although South-Central desires to bid on the Icy Cape No. 2 timber sale, it is hampered by its lack of a working mill in Alaska. South-Central must take into account the added costs of having primary manufacture performed in-state. This added cost effectively precludes South-Central from bidding on the timber.

II. THE COMMERCE CLAUSE AND PRIMARY MANUFACTURE

The State and intervenor contend that the primary manufacture requirement is permissible under the commerce clause for two reasons: 1) Alaska's policy of requiring primary manufacture as a term of a state timber contract is consistent with federal policy as expressed by Congress; and, 2) by including primary manufacture as a term in the state timber contract, the state is not regulating interstate commerce; rather it is acting in a proprietary capacity as a market participant and is therefore exempt from commerce clause requirements.

A. Federal Policy Of Primary Manufacture

It is clear that if Congress had consented to the State's primary manufacture requirement, any commerce clause restrictions would be waived. *E.g. Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). To determine whether Congress has consented to the requirement, the court must examine the relevant Congressional provisions in this area.

The State points out that the federal government historically has placed restrictions on the export of unprocessed logs from federal lands in the western states, including federal lands in Alaska. Since 1928, the United States Forest Service has restricted the export of unprocessed timber from national forest timber sales in Alaska under the general authority granted by Congress. 16 U.S.C. § 471 *et seq.* (1976) (National Forests).

Section 475 provides in part that one of the purposes for establishing a national forest is "to furnish a continuous supply of timber for use and necessities of the citizens of the United States" Section 551 allows the Secretary of Agriculture, under the provisions of § 471, to make necessary "rules and regulations and establish such service . . . to regulate . . . and to preserve the forests" Regulations currently in effect restrict the export, in unprocessed form, of timber harvested from sales in national forest land in Alaska. 36 C.F.R. § 223.10(i).³

³ 36 C.F.R. § 223.10(i)(1977) provides:

Subject to the other provisions of this section, timber cut from the National Forests in the State of Alaska may not be exported from Alaska in the form of logs, cordwood, bolts, or other similar products necessitating primary manufacture elsewhere without prior consent of the Regional Forester. This requirement is determined to be necessary in order to assure the development and continued existence of adequate wood processing capacity in that State essential to the sustained utilization of timber from the National Forests located therein which is geographically isolated from other processing capacity. In determining whether consent will be given to the export of such timber, consideration will be given, among other things, to whether such export will (1) permit a more complete utilization of material on areas being logged primarily for products for local manufacture, (2) prevent loss or serious deterioration of logs unsalable locally because of an unforeseen loss of market, (3) permit the salvage of timber, damaged by wind, insects, or fire, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

An examination of the relevant statutory provisions shows that Congress has not consented to any primary manufacture requirements imposed by the states. When Congress has exempted state laws from commerce clause restrictions, it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. *See* the Wilson Act, 27 U.S.C. § 121 (1976); *see also* the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1976) ("silence . . . of Congress shall not be construed to impose any barrier to . . . regulation . . . by the several states.").

Although Congress has authorized the Secretary of Agriculture to make necessary rules to regulate the national forests, and has imposed export quotas on unprocessed timber from federal lands, it has in no way expressly exempted state timber laws from commerce clause restrictions. Given Congress' silence, a negative is presumed to bar state action inimical to the national commerce, and in such cases the Supreme Court is "the final arbiter of the competing demands of state and national interests." *South Pacific Co. v. Arizona*, 325 U.S. at 769.

B. The State As A Proprietor

The State maintains that it is acting in a proprietary capacity (as the timber subject to the primary manufacture requirement is state owned) and is therefore unrestricted by the commerce clause. *Reeves v. Stake*, 447 U.S. 429, 100 S. Ct. 2271 (1980); *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976). The Supreme Court has made clear, however, that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). The court must determine whether *Alexandria Scrap* and *Reeves* allow the State to require primary manufacture of state-owned timber within Alaska as a condition of sale.

1. Alexandria Scrap And Reeves

In *Alexandria Scrap*, the Court upheld a Maryland statute which promoted the disposal of abandoned automobiles through cash payments to scrap processors. Even though the payments favored in-state processors, the Court found no commerce clause problems. Relying on the fact that Maryland was acting in a proprietary capacity, the Court held that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others," 426 U.S. at 810.

In *Reeves*, the Court ruled that the commerce clause did not prohibit South Dakota from refusing to sell cement from a state owned and operated cement plant to out-of-state customers, pursuant to its policy of supplying South Dakota customers first. The Court noted that "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." 477 U.S. at 436, 100 S. Ct. at 2277.

The *Reeves* Court termed the holding in *Alexandria Scrap* the "general rule" as to states acting in a proprietary manner. 477 U.S. at 440, 100 S. Ct. at 2279. The Court went on to concede the possibility of an exception, but reasoned: "in this case [there is] no sufficient reason to depart from the general rule." *Id.* Later, the Court addressed the possible limits to the *Alexandria Scrap* exemption when it considered the argument that if a state were allowed to hoard its resources "Pennsylvania might keep its coal, the northwest its timber, [and] the mining States their minerals." *West v. Kansas Nat. Gas Co.*, 221 U.S. 229, 255 (1911). The Court distinguished cement from natural resources such as coal, timber, wild game, and minerals, and noted that "South Dakota has not sought to limit access to the State's limestone or other materials used to make cement." 447 U.S. at 444, 100 S. Ct. at 2281.

Here the State is restricting the flow of a state-owned natural resource rather than a state-owned man-made commodity.

Timber is not a commodity which, when needed, is capable of being readily produced by any state at any time. Conversely, a state may enter the cement business, with little problem, in order to supply its region with needed cement. The uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow, prevent a state from economically discriminating in favor of its residents simply because a resource lies on state-owned land.

The court finds that the State's primary manufacture requirement goes beyond the *Alexandria Scrap* exemption, as a natural resource is involved. The *Alexandria Scrap* general rule is not a magic talisman which allows a state to place unconstitutional restrictions on a resource if it is state-owned. While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not "attach conditions to the use or disposition of the resource that might independently burden interstate commerce" *Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup.Ct.Rev. 51, 71 (1980).

Since the court has determined that the primary manufacture requirement goes beyond the *Alexandria Scrap* exemption, it must determine whether this requirement unconstitutionally burdens commerce.

2. The Pike Test

The Supreme Court has set forth the criteria for determining the validity of state actions affecting interstate commerce. The rule that emerges is that:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the

local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted).

Under this test, the primary manufacture requirement is unconstitutional. The requirement does not regulate even-handedly, as it does not fall evenly on companies with in-state timber mills and companies with out-of-state timber mills; the requirement precludes South-Central from competing on equal footing with companies that possess in-state mills capable of performing primary manufacture.

Additionally, the public interest served goes beyond the Court's sanction of permissible commerce clause burdens. See e.g. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (state regulation furthering public safety, but burdening commerce held permissible). Here the purpose served is economic—"to protect existing industries, provide for the establishment of new industries, [and] derive revenue from all timber resources" Governor's Office News Release (June 30, 1961) (Governor Egan's policy statement on primary manufacture).

Through the years, the Supreme Court has been alert to the evils of economic protectionism. The Court frequently has indicated that the purpose of the commerce clause was to avoid "the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 332, 325 (1979). "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. at 624.

Turning to the "burden" side of the *Pike* test, the primary manufacture requirement places a substantial rather than an incidental burden on commerce. The application of the primary manufacture requirement would, at the least, require companies without mills in Alaska to lease mill facilities within the

state capable of performing the requirement. Indeed, the "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike*, 397 U.S. at 145.

Finally, the court finds that less burdensome means are available to the State to achieve the same end. For example, the state may implement a statutory scheme which encourages in-state processing rather than action which bars out-of-state processing. This is, however, a legislative question; the court simply notes other schemes are available.

Accordingly, IT IS ORDERED:

1) THAT plaintiff's motion for summary judgment is granted.

2) THAT defendant's motion for summary judgment is denied and intervenor's motion to dismiss is denied.

3) THAT the clerk may prepare a final judgment form stating that the named defendants or any official of the State of Alaska are permanently enjoined from requiring primary manufacture of state-owned timber pursuant to 11 A.A.C. § 76.130, as the requirement of primary manufacture violates art. I, § 8 of the United States Constitution.

DATED at Anchorage, Alaska, this 5th day of January, 1981.

/s/ JAMES A. VON DER HEYDT

United States District Judge

cc: Leroy E. DeVeaux

Mark L. Figura

Shelley Higgins, Assistant Attorney General

**JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ALASKA
(ENTERED JAN. 6, 1981)**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

Civil Action File No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

v.

**ROBERT LERESCHE, Commissioner of the Department of
Natural Resources of the State of Alaska, et al.**

This action came on for (hearing) before the Court, Honorable James A. von der Heydt, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the named defendants or any official of the State of Alaska are permanently enjoined from requiring primary manufacture of state-owned timber pursuant to 11 A.A.C. § 76.130, as the requirement of primary manufacture violates art. I, Section 8 of the United States Constitution.

JUDGMENT

FILED

January 6, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

By _____ Deputy

Costs taxed by Clerk in amount
of \$112.00 on January 21, 1981.

/s/ D. COKER

D. Coker
Deputy Clerk

Dated at Anchorage, Alaska, this 6th day of January, 1981.

APPROVED:

/s/ JAMES A. VON DER HEYDT

James A. von der Heydt
United States District Judge

JOANN MYRES

JoAnn Myres
Clerk of Court

By: /s/ DONNA COKER

Donna Coker
Deputy Clerk

COPY FILED IN O. & J. VOL. 1755

PAGE ____.

**OPINION OF THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT (ENTERED
DEC. 1, 1982)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-3053X
81-3081X

D.C. No.
A80-311 Civ.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appellee,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska; *et al.*,
Defendants-Appellants,

KENAI LUMBER COMPANY, INC.,
Intervenor Defendant.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appelles,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska; *et al.*,
Defendants,

KENAI LUMBER COMPANY, INC.,
*Intervenor
Defendant-Appellants.*

FILED

December 1, 1982

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

OPINION

**Appeal From The United States District Court
For The District Of Alaska**

**Honorable James A. von der Heydt, Chief Judge,
United States District Judge, Presiding**

Argued and Submitted: December 10, 1981

Before: GOODWIN, KENNEDY, and SKOPIL, Circuit Judges.

KENNEDY, Circuit Judge:

The State of Alaska, by statute, authorizes the imposition of certain conditions on the sale of state-owned timber, conditions pointedly designed to favor its local timber processors. In an action brought by a prospective timber buyer challenging the constitutionality of the state's restrictions, the district court held the Alaska statute violates the commerce clause of the United States Constitution. We conclude there is implicit approval of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands. We reverse the district court's finding of invalidity.

The Commissioner of the Department of Natural Resources of Alaska is by law given discretion to condition particular sales of timber on primary manufacture in Alaska.¹ In 1980 the Commissioner gave notice of a proposed sale of state-owned timber at Icy Cape and announced that Alaska would require

¹ The Commissioner of the Department of Natural Resources of Alaska, upon recommendation of the Director of the Division of Lands of the Department of Natural Resources, "shall determine the timber and other materials to be sold, and the limitations, conditions and terms of sale." Alaska Stat. § 38.05.115.

The Alaska regulations provide that:

- (a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

primary manufacture within the state as a special provision of the contract.² The Commissioner stated the requirement was necessary to insure "a continuing supply of timber for existing

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

11 A.A.C. 76.130. The primary manufacture requirement is defined further by the Governor's Policy Statement of Primary Manufacture of May 7, 1974.

² The notice of public sale set out the primary manufacture contract term as follows:

Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974. For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips are considered to have received primary manufacture.

industry" during temporary shortages of timber from federal lands. Final Finding for Icy Bay/Cape Yakatuga Sale at 2 (Excerpt of Record (E.R.) 121, 122).

Appellee South-Central Timber Development, Inc. is an Alaska corporation engaged in purchasing timber and processing it for sale. It does not own an operating mill in Alaska, and its practice had been to process Alaskan timber outside the state. When it learned of the new requirement, South-Central brought this action for injunctive relief against various state officials. The company claimed it was prevented from bidding on the Icy Cape sale by the added expense of in-state processing. The district court granted a temporary restraining order, and when it expired the applicants agreed to postpone the sale until a final decision on the merits.

Kenai Lumber Company, Inc. intended to bid at the Icy Cape sale to obtain timber for its sawmill in Alaska. The district court allowed Kenai to intervene in the suit as a defendant. Upon cross-motions for summary judgment, the district court granted summary judgment for plaintiff-appellee, and concluded that the primary manufacture requirement put an impermissible burden on interstate commerce.

It long has been settled that states may regulate in some areas of commerce, absent congressional action to displace such laws, *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. 298 (12 How.) (1851); but state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). The rule has been invoked to invalidate state statutes which promote local processing industries by forbidding shipment of raw resources, *Foster-Fountain Packing v. Haydel*, 278 U.S. 1 (1928). The commerce clause by its own power invalidates such discriminatory statutes.

Despite the force of this rule, there are narrow exceptions, as in the case of a state proprietary activity. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). Alaska contends its statute is saved

by that exception here. We need not reach the question, however. This is not a case where the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy.

While there may be some outer limits to its power, it is generally accepted that Congress is free to approve and thereby validate commercial regulations otherwise beyond a state's authority. Congress can "confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44.

The rule acknowledging congressional power to approve otherwise impermissible state regulation of interstate commerce usually is applied in cases where Congress has expressly authorized such regulation, *see, e.g., Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981). But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests.

The federal government has consistently endorsed restrictions on the interstate shipment of timber to protect the local processing capability of isolated areas, evincing a general federal policy of promoting geographic dispersion in the timber industry. Since 1928 the Forest Service has limited the export of unprocessed logs from National Forests in Alaska under general authority granted by the Organic Administration Act of June 4, 1897 (16 U.S.C. § 475, 551). In 1969 Congress set a quota on the unprocessed timber that could be exported from federal lands west of the 100th meridian (a line running south from the mid-point of the North Dakota-Canadian boundary, through central Texas). Lindell, *Log Export Restrictions of the Western States and British Columbia*, 7 (U.S. Dept. of Agri-

culture 1978) (E.R. 130). In 1973 Congress strengthened its policy by a complete ban on the export of unprocessed timber from such lands.³

When Alaska was admitted to statehood in 1959 and received title to a large portion of the territory's public lands, it continued to adhere, with limited exceptions, to preexisting federal policy.⁴ Lindell, *Log Export Restrictions of the Western States and British Columbia*, 7 (U.S. Dept. of Agriculture 1978) (E.R. 135). The state's primary manufacture requirements duplicate those imposed on federal timber and serve the same objective, that of promoting industrial developments in isolated areas. The decision of Alaska's Commissioner of Natural Resources to condition the sale at Icy Cape on primary manufacture was made in the wake of a temporary suspension of federal timber sales from the Tongass and Chugach National Forests. Final Findings on Icy Bay/Cape Yakatuga Sale at 2 (E.R. 122). Its purpose was to protect local processors from

³ The Forest Service regulations are found at 36 C.F.R. § 223.10(b) (1981). The Bureau of Land Management provisions are set forth at 43 C.F.R. §§ 5400.0-3(c), -5 (1981).

⁴ The regulations for Alaska state:

Unprocessed timber from National Forest System Lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. *This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities.* In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (1) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire, or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

36 C.F.R. § 223.10(c) (1981) (emphasis added).

the resulting slack in demand for their services. The state's decision could not have been more in keeping with federal timber policy. In these circumstances, we find ample congressional acquiescence in Alaska's primary manufacture requirement. The judgment of the district court is REVERSED.

**JUDGMENT OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT
(ENTERED DEC. 1, 1982)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-3053
81-3081
DC CV 80-3111 JAH

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appellee,

v.

ROBERT LERESCHE, Commissioner of the
Department of Natural Resources of the State
of Alaska; et al.,
Defendants-Appellants,

KENAI LUMBER COMPANY, INC.,
Intervenor, Defendant-Appellant.

JUDGMENT

APPEAL from the United States District Court for the
_____ District of ALASKA (Anchorage)

THIS CAUSE came on to be heard on the Transcript of the
Record from the United States District Court for the _____
District of ALASKA (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here
ordered by this Court, that the _____ judgment of the said
District Court in this Cause be, and hereby is reversed.

ARMS DEC 28 1982

A TRUE COPY

ATTEST MAR 31 1983

PHILLIP B. WINBERRY

CLERK

by Jereldine Curtis, Senior Deputy

JERELDINE CURTIS

Filed and entered December 1, 1982

No. 82-1608

Office-Supreme Court, U.S.
FILED

MAY 23 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

ESTHER WUNNICKS

VS.

~~ROBERT L. REED~~, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, et al.,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respondents*

QUESTIONS PRESENTED

1. Assuming the Commerce Clause applies to a state decision to sell state-owned timber subject to a requirement that the purchaser process the timber in state before export, must Congress pass a statute specifically authorizing the state to do so, or, can congressional consent be implied from federal statutes and regulations which impose the same processing requirement on federal timber sales in the state?

2. When a state sells state-owned timber subject to a requirement that the purchaser process the timber in state before export, is the state acting as a market participant, rather than a market regulator, so as to be exempt from Commerce Clause scrutiny?

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No. 82-1608

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

VS.

ROBERT LERESCHE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, et al.,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Respondents, Robert LeResche, Commissioner of Department of Natural Resources of the State of Alaska, and other officials of the State of Alaska, ("state respondents") oppose the petition for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit filed by Petitioner South-Central Timber Development, Inc. ("South-Central").

OPINIONS BELOW

The opinion of the court of appeals is reported at 693 F.2d 890 (9th Cir. 1982). The opinion of the district court is reported at 511 F. Supp. 139 (D. Alaska 1981).

JURISDICTION

The state respondents accept the petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3.
2. The Organic Administration Act of June 4, 1897, 16 U.S.C. §§ 475, 476.
3. Act of April 12, 1926, 16 U.S.C. §§ 616-617.
4. 36 C.F.R. § 223.10 (1981) ; 43 C.F.R. § 5400.0-3(c),-5 (1981).
5. Alaska Stat. § 38.05.115.
6. 11 Alaska Administrative Code §§ 71.230, 71.910(11) (1982).

STATEMENT OF THE CASE

The Commissioner of the Department of Natural Resources of Alaska is given discretion under state law to set the terms and conditions for state timber sales, and is specifically authorized to condition sale of state-owned timber on primary manufacture in Alaska.¹ In 1980 the Commissioner gave notice of a proposed sale of state-owned timber at Icy Cape on Prince William Sound in Southcentral Alaska and announced that Alaska

¹Alaska Stat. § 38.05.115; 11 A.A.C. § 71.230 (1982).

would require primary manufacture within the state as a special provision of the contract.³

The Commissioner decided to require primary manufacture as a term of the proposed Icy Cape timber sale because the requirement was necessary to assure a continuing supply of timber for existing timber mills in Southeast and Southcentral Alaska during a temporary shortage of timber from federal lands. E.R. 121-122.

The primary manufacture requirement included in the proposed state timber sale applies only to the purchaser of that timber sale. The requirement does not affect timber which is not owned and sold by the State of Alaska. Timber harvested in Alaska from privately-owned land is not affected by the State's primary manufacture requirement for its own timber sales and may be sold under whatever terms are agreeable to the buyer and seller.

Alaska's primary manufacture requirement for state timber sales is virtually identical to the long-standing processing requirement for federal timber sales in Alaska. In fact, Alaska's primary manufacture requirement is a continuation of federal timber policy that pre-existed

³The primary manufacture contract term requires the purchaser to perform initial processing of harvested logs in Alaska prior to export. Primary manufacture, as defined by the proposed contract terms and regulations of the Alaska Department of Natural Resources, is accomplished by either squaring good quality saw logs into cants by cutting four slices along the length of the log, or processing poor quality logs into chips. Excerpt of record ("ER") at 6-7, 23; 11 A.A.C. § 71.910(11) (1982). The primary manufacture contract requirement is satisfied when the purchaser processes the harvested logs into cants or chips. Cants or chips may be exported for further processing or may be further processed or sold within the state.

Alaska Statehood. Since 1928 the Forest Service has limited the export of unprocessed logs from national forests in Alaska under authority granted by the Organic Administrative Act of June 4, 1897 (16 U.S.C. §§ 475, 476) and the Act of April 12, 1926 (16 U.S.C. § 616).

In 1928 the Secretary of Agriculture promulgated regulations which prohibit the export of unprocessed logs from national forest lands in Alaska without approval of the Regional Forester. The regulations have remained in effect in substantially the same form.³ The purpose of the federal processing requirement is to promote the development of an adequate wood processing industry in Alaska.

In 1969 Congress set a quota on the unprocessed timber that could be exported from federal lands west of the one-hundredth meridian (a line running south from the mid-

³The current forest service regulations for Alaska, found at 36 C.F.R. § 223.10(c) (1981), state:

Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. *This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities.* In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (1) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire, or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation. (Emphasis added.)

point of the North Dakota—Canadian boundary, through central Texas). (16 U.S.C. § 617). In 1973 Congress strengthened its policy by imposing a complete ban on the export of unprocessed timber from such lands through a series of annual riders to appropriation acts.⁴

Petitioner South-Central Timber Development, Inc. is an Alaska corporation engaged in purchasing standing timber, harvesting and processing the timber for sale. South-Central was operating in Alaska under an earlier state timber sale contract which did not require local processing, and exporting most of the logs to Japan. South-Central did not have a working mill in Alaska. When it learned of the primary manufacture requirement for the proposed Icy Cape timber sale, South-Central brought this action for injunctive relief against various state officials. South-Central claimed it was prevented from bidding on the Icy Cape sale by the added expense of in-state processing. The District Court granted a temporary restraining order and the State agreed to postpone the sale until final decision on the merits. Upon cross-motions for summary judgment, the district court granted summary judgment to South-Central, concluding that the primary manufacture timber sale requirement was not exempt from Commerce Clause scrutiny and that it constituted an unreasonable burden on interstate commerce.

On appeal the Ninth Circuit Court of Appeals reversed. The court of appeals concluded that, even assuming the

⁴See e.g., P.L. 96-126 § 301, 93 Stat. 979, which was in effect when this action was filed. The Forest Service regulations which prohibit the export of unprocessed timber from National Forest lands are found at 36 C.F.R. § 223.10 (1981). The Bureau of Land Management regulations are set forth at 43 C.F.R. § 5400.0-3(c), -5 (1981).

Commerce Clause does apply, Congress has consented to the State's primary manufacture requirement. The court of appeals found implicit congressional approval of the Alaska primary manufacture requirement from federal statutes and regulations which impose identical processing requirements on timber from federal lands in Alaska and the western states. The court of appeals did not decide whether Alaska is acting as a market participant in requiring primary manufacture as a condition of state timber sales and is, therefore, exempt from Commerce Clause scrutiny.

REASONS FOR DENYING THE WRIT

Summary of Argument

The court of appeals correctly decided that the Commerce Clause does not prohibit Alaska from conditioning the sale of state-owned timber on primary processing in Alaska. Finding implicit congressional consent to Alaska's primary manufacture requirement on the facts of this case is consistent with prior decisions of this Court.

Furthermore, the decision below is correct without regard to the issue of implied congressional consent. In requiring primary manufacture as a term of a contract for the sale of state-owned timber, the State of Alaska is directly participating in the market as a seller, rather than regulating the timber market. Therefore, Alaska's primary manufacture requirement is exempt from Commerce Clause scrutiny under recent decisions of this Court.

This case has no significant impact on foreign commerce. The potential impact of this case as precedent is very

limited due to the particular facts upon which the court of appeals found implied consent.

1. The court of appeals decision does not conflict with, and is supported by, decisions of this Court.

The court of appeals decision that Congress has implicitly approved of the Alaska primary manufacture requirement is not, as petitioner asserts, in direct conflict with decisions of this Court. To the contrary, the decision below is consistent with decisions of this Court finding congressional consent to state action challenged under the Commerce Clause where the state has followed a specific federal policy authorized by Congress for the affected commerce.

In this case, Congress has affirmatively approved of the policy of restricting export of unprocessed timber from Alaska to promote development of the wood processing industry in Alaska. As the court of appeals recognized, Alaska is merely adhering to federal policy that pre-existed statehood in requiring primary manufacture for state timber sales. Alaska's primary manufacture requirements duplicate the processing requirements imposed on federal timber and serve the same objective. 693 F.2d at 893.

In three cases cited by petitioner, *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), *Sporhase v. Nebraska*, 102 S.Ct. 3456 (1982), and *Lewis v. B.T. Investment Managers Inc.*, 447 U.S. 27 (1980), this Court rejected arguments that Congress had impliedly consented to state action that would otherwise violate the Commerce Clause. However, none of those cases involve the situation pre-

sented in the instant case where Congress has expressly approved of a specific federal policy for the affected commerce and the state has adopted a consistent and parallel policy.

The question in *New England Power* was whether Congress had authorized New Hampshire to prohibit the exportation of hydroelectric power produced in that state. New Hampshire claimed that the Federal Power Act authorized it to prohibit the export of locally produced hydroelectric power. However, the relevant provision in the Federal Power Act said nothing about prohibiting the export of hydroelectric power. It merely stated that the Act was not intended to deprive a state of any lawful authority it exercised over the exportation of hydroelectric energy. 331 U.S. at 341. Congress had not approved in any way of the policy adopted by New Hampshire of prohibiting the export of hydroelectric power in order to protect local consumers.

At issue in *Sporhase v. Nebraska* was a Nebraska statute which restricted the export of ground water by conditioning export on reciprocity by the receiving state. Nebraska argued that Congress had impliedly consented to its restriction of ground water export in numerous federal statutes that generally indicated Congress' deference to state water law. 102 S. Ct. at 3466. None of those statutes said anything about the policy of restricting ground water export to protect in-state consumers.

Lewis v. B.T. Investment Managers was a Commerce Clause challenge to a Florida statute which prohibited out-of-state banks and holding companies from owning Florida investment subsidiaries. This Court rejected

Florida's arguments that the Federal Bank Holding Company Act authorized the Florida restriction because neither the policy nor effect of the Florida ban on interstate commerce had been approved by Congress in that statute. 447 U.S. at 47-49.

The Court's recent decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 51 U.S.L.W. 4211 (U.S. Feb. 28, 1983), cited by petitioner, supports the court of appeals decision in the instant case. *White* was a Commerce Clause challenge to a Boston executive order requiring all construction projects funded in whole or in part by city funds to be performed by a work force at least half of which were bona fide residents of the city. The Court held that insofar as the Boston local hire order applied to projects financed in part by federal funds, the city was acting as a market regulator but there was no Commerce Clause violation because federal regulations affirmatively permitted the type of parochial favoritism involved in the Boston local hire order.

In *White* this Court concluded that Congress had approved of the Boston local hire order even though there was no federal statute expressly stating that cities are authorized to require local hire on projects financed in part by the city and in part by federal funds. The applicable federal statutes merely stated that the federally funded programs were intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed. 51 U.S.L.W. at 4213. From these general congressional statements of policy for the expenditure of federal funds on redevelopment projects, this Court concluded that Congress had affirmatively

approved the challenged local hire practice of the City of Boston. The Ninth Circuit applied a very similar analysis in reaching its decision in the instant case.⁵

To summarize, the court of appeals decision in this case is fully consistent with and supported by the Court's decision in *White*. This case is distinguishable from cases cited by petitioner in which the Court has rejected arguments of implied congressional consent to state action that would otherwise violate the Commerce Clause because in those cases there was no congressionally approved federal policy similar or identical to the state policy being challenged as violative of the Commerce Clause.

2. **The Commerce Clause does not even apply because Alaska is directly participating in the market as a seller of timber rather than regulating private trade in timber.**

The decision below that Alaska's primary manufacture requirement does not violate the Commerce Clause is correct without regard to the issue of implied congressional consent to the primary manufacture requirement.

⁵Although the court of appeals did not cite it as precedent, *Parker v. Brown*, 317 U.S. 341 (1943), also supports the decision in this case. *Parker v. Brown* was a challenge on anti-trust and Commerce Clause grounds to a raisin marketing program enacted by the State of California. The California program required each grower to deliver over two-thirds of his raisin crop to a committee which then exercised marketing control over raisins so as to eliminate competition between producers and maintain a viable price for the raisin crops. The Court sustained the California regulation against the Commerce Clause challenge on the ground that the state regulation was consistent with the general policy that Congress had established for stabilizing the marketing of agricultural commodities, although Congress had not expressly approved California's program. *Id.* at 359-368.

Recent decisions of this Court make clear that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers, Inc.*, 51 U.S.L.W. 4211 (U.S. Feb. 28, 1983). Although the court of appeals did not reach this issue, it is clear that Alaska's action in the instant case constitutes direct participation in the market, rather than regulation of private trade in the timber market.

In *Hughes v. Alexandria Scrap Corp.*, the Court first announced the principle that state participation in a market is not the type of state activity prohibited by the Commerce Clause:

Nothing in the purposes animating the Commerce Clause forbids a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

426 U.S. at 810. The Court affirmed this holding in *Reeves v. Stake*, 447 U.S. at 436-440, and most recently, in *White v. Massachusetts Council of Construction Employers*, 51 U.S.L.W. at 4212.

Reeves was a Commerce Clause challenge to action by the State of South Dakota as a seller of cement. South Dakota restricted the sale of state-owned cement to residents of South Dakota, cutting off an out-of-state distributor who had previously purchased the cement produced by South Dakota. Recognizing that South Dakota, as a seller of cement, was acting as a market participant rather than as a regulator of private trade in cement, the

Court held that South Dakota's resident-preference policy for the state sale of cement did not violate the Commerce Clause.

The instant case is similar to *Reeves* in every significant respect. In this case Alaska, like South Dakota in *Reeves*, has adopted the challenged requirement as a condition of the sale of property actually owned by the state. Like the state-owned cement in *Reeves*, the state-owned timber in this case represents an investment of tax dollars. Just as South Dakota invested state revenues in producing cement, Alaska has expended state revenues to manage the commercial timber land it owns and to plan and supervise the harvest and sale of the timber.*

In this case, as in *Reeves*, the challenged state sale restriction applies only to the immediate party with whom the state is transacting business. South Dakota restricted its cement sales to state residents. Alaska restricts its major timber sales to purchasers who will agree to perform primary processing of the timber in Alaska before export. Alaska's primary manufacture requirement is a term of the timber sale contract, binding only on the purchaser of the state timber sale. After the purchaser performs primary manufacture in accordance with the con-

*The state-owned timber land at Icy Cape which is directly involved in the instant case was patented to the State under the land grant provisions of the Alaska Statehood Act, P.L. 85-508, § 6, 72 Stat. 339 (1958). However, petitioner's argument that the Commerce Clause prohibits Alaska from selling state-owned timber subject to a primary processing requirement, would apply equally to state-owned timber on land that the State purchased. The cost of purchasing the commercial timber land would be an added substantial investment of state tax dollars.

tract terms, the purchaser is free to export and sell the timber without restriction. The primary manufacture requirement does not apply to any resales or downstream transactions.⁷

Finally, in this case, as in *Reeves*, there is no attempt to hoard natural resources found within the state. By requiring primary manufacture as a term of a state timber sale, Alaska is not affecting access by out-of-state industry or consumers to timber harvested from federal or private land in Alaska. The State of Alaska, as only one of many owners of commercial timber land in Alaska, possesses no unique access to timber.

In *White v. Massachusetts Council of Construction Employers*, the Court held that the City of Boston was acting as a market participant, not subject to Commerce Clause restrictions, when it required that all construction projects funded in whole by city funds be performed by a work force consisting of at least half Boston residents. The Court rejected the argument that the Boston local hire requirement went beyond participation in the market be-

⁷Petitioner South-Central and Amici Pacific Rim Trade Association, et al., assert that the primary manufacture requirement applies after the initial sale and restricts the disposition of privately owned logs to third parties. This argument is based on a technicality of the timber sale contract which provides that the purchaser must pay for the logs after the timber is cut and scaled but before primary manufacture is performed. The timing of the payment under the contract does not alter the fact that primary manufacture is a term of the initial sale contract, binding only on the purchaser who directly contracts with the state. Moreover, primary manufacture is an integral term of the initial timber sale contract because the price that the purchaser pays for the logs is reduced to reflect the cost to the purchaser of processing the timber.

cause it reached beyond the immediate parties employed by the city and regulated contracts between public contractors and their subcontractors. 51 U.S.L.W at 4213, n. 7.

Alaska's primary manufacture requirement is an even clearer situation of direct state participation in the market than was the local hire order sustained by the Court in *White*. Alaska's role in this case is that of a seller of timber, pure and simple. In offering state-owned timber for sale on the condition that the purchaser performs primary manufacture, Alaska is not regulating contracts for the resale of the timber or regulating the buying and selling of privately-owned timber. The primary manufacture requirement, unlike the local hire order in *White*, stops at the boundary of formal privity of contract.

Since Alaska's role is clearly that of a direct market participant, Alaska's primary manufacture requirement for state timber sales is not subject to the restraints of the Commerce Clause.

3. This case does not significantly impact foreign commerce in timber or other resources.

This Court should not be persuaded to grant the writ on the basis of petitioner's and amicus' claims that this case significantly impacts foreign commerce and will encourage states to enact export restrictions on natural resources other than timber. These claims lack substance.

There is no basis in the record for concluding that Alaska's primary manufacture requirement has any substantial impact on foreign or interstate commerce. When Alaska chooses to include a primary manufacture requirement in a contract for the sale of state timber, the require-

ment applies only to the timber involved in that sale. It does not affect timber entering foreign commerce from federal or privately-owned land in Alaska.⁸

Alaska's primary manufacture requirement impacts foreign trade in timber only to the extent that Alaska chooses to sell state-owned timber and chooses to apply a primary manufacture requirement to the sale. The same impact on foreign commerce (the unavailability for export of unprocessed logs from state-owned lands) would occur if the state chose not to sell state-owned timber. The State could, for example, decide to harvest and process state-owned timber itself for use within the State. Alternatively, the State could decide to sell state-owned timber only to persons who have operating lumber mills in Alaska.⁹ None of these alternatives would violate the Commerce Clause yet the impact on foreign export of unprocessed logs from state-owned lands would be the same.

Furthermore, the impact of Alaska's primary manufacture requirement on foreign commerce is significantly less than the impact of the congressionally approved federal

⁸While it is true that Alaska's primary manufacture requirement has a substantial impact on trade in timber originating from state timber sales, the relevant question is whether the state action substantially affects or burdens the national or international timber market, not just that small part of commerce created by the State's decision to sell state-owned timber. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809, n. 18 (1976) (the Commerce Clause does not forbid state action reducing or eliminating commerce created by the State's market participation).

⁹Alaska Stat. § 38.05.118 (Supp. 1982) authorizes the Commissioner of the Department of Natural Resources to negotiate a sale of timber to a local manufacturer when there is a high level of local unemployment within the area serviced by the local manufacturer.

processing requirements for timber from federal land because the federal government owns the great majority of the commercial timber land in Alaska.¹⁰

Moreover, it is significant that the federal policy of requiring primary manufacture for federal timber has been effective in Alaska since 1928 and Alaska's policy of requiring primary manufacture as a condition of major state timber sales has been followed since 1959 when Alaska became a state. In short, the effect of the decision below is to maintain the status quo that has existed since 1928 with respect to restrictions on the export of unprocessed timber from Alaska. The court of appeals decision does not result in any new or additional restrictions on foreign export of timber products from Alaska.

Finally, petitioner argues that the impact of the Ninth Circuit decision is not limited to the timber industry but will encourage states to adopt similar restrictions with respect to other natural resources. The decision below does not, as petitioner implies, have broad precedential impact and could not reasonably justify or encourage other states to adopt regulations restricting the export of other natural resources. As precedent the decision below is limited to similar facts, situations in which a state is selling a state-owned resource subject to the same terms of sale that the

¹⁰Appendix H to petitioner's brief, at pages 52A through 54A, shows that out of a total of approximately 11½ million acres of commercial timber land in Alaska, the federal government owns approximately 8½ million acres, the State of Alaska owns approximately 2½ million acres and private parties own less than half a million acres. The same statistics indicate that other western states which own commercial timber land own significantly less commercial timber land than do private parties and the federal government.

federal government requires by law for federal sales of that resource. This is a rather unique set of facts and it seems unlikely that any parallel or substantially similar situation exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 20, 1983.

No. 82-1608

SEP 24 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

ESTHER WUNWICKE

VS.

~~ROBERT L. RESCOTT~~, Commissioner of Department
of Natural Resources of the State of Alaska, et al.,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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No. 82-1608

In the Supreme Court

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United States

OCTOBER TERM, 1983

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Respondent.

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

The Solicitor General's brief imaginatively asserts that the Ninth Circuit's decision presents two dangers: (1) unbridled judicial speculation over "parallel" federal policy when state statutes affecting interstate commerce are challenged; and (2) undue restriction of the timber industry by the broad sanction of state regulation of the export of unprocessed timber. Neither danger results from nor is presented by the Ninth Circuit opinion.

A. The Alaska Primary Manufacture Requirement Furthers Express Federal Policy

The Solicitor General argues that there is a *per se* rule that only express Congressional authorization can validate an otherwise impermissible state regulation of interstate commerce. A *per se* rule is simply too restrictive and has never been required by this Court. Where it cannot be doubted that Congressional policy is furthered by a state regulation, the courts should not be precluded from upholding that regulation.

White v. Massachusetts Council of Construction Employers, Inc., 103 S. Ct. 1041 (1983), cited by the Solicitor General, demonstrates the point. In *White*, this Court found that federal statutes "intended to encourage revitalization, including improved opportunities for the poor, minorities, and unemployed" "affirmatively permit" a hiring preference for Boston residents. *Id.* at 1047. Nothing in those statutes "expressly" authorized the hiring preference.¹ Nonetheless, the preference was upheld because it "sounds a harmonious note" with the policy underlying the federal statutes and regulations. *Id.*

Alaska's primary manufacture requirement challenged here does more than sound "a harmonious note" with federal policy; it is in perfect consonance with it. As set out in more detail in Alaska's Brief in Opposition (pp. 3-5), federal policy since 1928 has been to limit the export of unprocessed logs from national forest lands in Alaska. The

¹The regulations implementing those statutes authorized a preference for persons residing in the general area of the subject projects, but even they did not sanction a preference limited to residents of a particular political subdivision.

Solicitor General notes that "[t]he objective of the federal timber policy for national forest lands, as set forth in the Organic Administration Act of 1897, 15 U.S.C. 475 (Pet. App. 22a), is to secure 'favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States.'" (U.S. Br. 8). 36 C.F.R. § 223.10(c) implements that Act by barring the export of unprocessed timber from national forest lands in Alaska "to ensure the development and continued existence of adequate wood processing capacity in that State [Alaska] for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities."

Express federal policy is, therefore, that development and maintenance of processing facilities in Alaska is in the national interest, and that policy is furthered by requiring that timber from federal lands be processed in those facilities prior to shipment. The parallel Alaska requirement simply preserved the federal requirement when the federal timber lands were conveyed to the state under Section 6 of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 330 (1958). Finding Alaska's primary manufacture requirement unauthorized under these facts would thwart an express Congressional policy which is more than fifty years old.

The Ninth Circuit did not have to "speculate" about federal policy for Alaska timber. 36 C.F.R. § 223.10(c) bars the export of unprocessed timber from national forest lands in Alaska "to ensure the development and continued existence of adequate wood processing capacity" in Alaska. Processing facilities will not be developed and maintained

in Alaska if there is not an assured supply of timber or if it is more profitable to export timber without in-state primary processing.

It is significant that primary manufacture was required as a term of the proposed sale which gave rise to this case in order to assure a continuing supply of timber for existing mills in southeast and southcentral Alaska during a temporary shortage of federal timber. E.R. 121-122. If Alaska did not have a primary manufacturing requirement, the express federal policy of ensuring the "continued existence of adequate wood processing capacity" in Alaska would be frustrated by the closing of the existing mills. The incidental benefits to local processors from the federal policy and from the state's furtherance of that policy do not invalidate the long standing determination that such a policy benefits the nation as a whole by promoting the sustained utilization of timber.

The Ninth Circuit opinion is not an invitation for unlimited "parallel" policy comparisons between every state statute affecting commerce and a purportedly ambiguous federal policy. It is a proper recognition that this well-defined and articulated federal policy³ and the challenged

³The Solicitor General speculates that Congress may not favor a ban on the export of timber from federal lands in Alaska, citing the fact that Congress exempted Alaska from the prohibition on the export of unprocessed western red cedar contained in the Export Administration Act of 1979. 50 U.S.C. app. § 2406 (Supp. III 1979) (Pet. App. 28a); 50 U.S.C. app. 2406(i)(1) (Supp. V); Act of Nov. 27, 1979, Pub. L. No. 96-126, Section 308, 83 Stat. 980 (1979). (Pet. App. 30a).

The Solicitor's speculative inference is unsupported. When Congress passed the Alaska red cedar exemption, it was certainly aware of the well-established federal timber policy for Alaska found in

state requirement are virtually identical and accomplish the same purpose. The lower courts are fully capable of applying such an analysis and distinguishing situations in the future where such unity of purpose is not present.

B. The Ninth Circuit's Decision Has No Significant Impact on the Timber Industry Outside Alaska

The Solicitor General again paints with too broad a brush the dangers to be feared from other state restrictions on the export of unprocessed logs. Three other states have required in-state primary manufacture for many years.² However, Alaska alone is singled out by federal policy for the express necessity of developing remote site processing. 36 C.F.R. §223.10(c). And, Alaska alone has enacted a corresponding state primary manufacturing requirement which is virtually identical to its federal counterpart. Alaska Stat. § 38.05.115 (1976); Alaska Admin. Code tit.11, § 71.230 (1982). (Pet. App. 19a-21a).

36 C.F.R. § 223.10(c). Congress did nothing to alter that policy in 1979, when it enacted the Alaska red cedar exception, and that policy remains the same today.

The western red cedar exception does not conflict with 36 C.F.R. § 223.10(c); rather, it is in complete accord with it. 36 C.F.R. § 223.10(c)(5) authorizes the export of unprocessed timber "to provide material required to meet urgent and unusual needs of the Nation." (Pet. App. 35a). Western red cedar was in short supply and Congress took action to balance domestic needs and export requirements for that particular timber only. Congress' silence on the federal and state primary manufacture requirement for all other types of Alaska timber indicates Congressional approval of that policy. The red cedar legislation also demonstrates that Congress will act when it believes there is a matter of national concern in allocating exports. (See U.S. Br. 10).

²Cal. Pub. Res. Code § 4650.1 (West Supp. 1982); Idaho Code § 58-403 (1974); Or. Rev. Stat. § 526-805 (1981). (Pet. App. 36a-38a).

36 C.F.R. § 223.10(b) and 43 C.F.R. § 5400.0-3(c) ban the export of unprocessed timber from national forest and other federal lands located west of the one-hundredth meridian in the contiguous forty-eight states. Only in 36 C.F.R. § 223.10(c), which refers only to Alaska, is it expressly stated that the primary manufacture requirement is necessary to assure the continued vitality of the wood processing industry. In order to assure a timber supply to effectuate this stated purpose, 36 C.F.R. § 223.10 (c) bans both interstate and foreign shipment of unprocessed timber, covers all timber, and limits exceptions to five very specific grounds. By contrast, 36 C.F.R. § 223.10 (b) and 43 C.F.R. § 5400.0-3(c) ban only foreign export and exclude all surplus domestic timber. It is clear then that the federal policy for Alaska timber lands is distinctly different than the policy pertaining to federal timber lands in other states.

Furthermore, only Alaska's primary manufacture requirement contains the same provisions as the federal regulation to accomplish the corresponding federal policy. Each of the other state statutes require primary manufacture by means far more stringent than their federal counterpart. For instance, Idaho requires in-state primary manufacture for timber destined for both domestic and foreign markets, while the federal regulations for federal lands in Idaho require in-state processing prior to foreign export only. Unlike the corresponding federal regulation, California, Idaho and Oregon all require primary manufacture for all state timber without exception for domestic surplus. Alaska's primary manufacture requirement, on the other hand, covers the same markets and the same

timber, and allows the same exceptions, as does the federal regulation for federal land in Alaska.

For these reasons, the Ninth Circuit's decision does not broadly sanction all state regulation of the export of unprocessed timber and, therefore, has little precedential value.

CONCLUSION

The Ninth Circuit reached the correct result on a narrow issue of Congressional consent in an unique situation where Congressional intent was unequivocal and the state statute clearly furthers that express intention. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1982

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On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

**A. The Decision Below Is Of Great Practical Importance To
The Timber Industry In All The Western States And To
State Control Over Natural Resources Generally.**

Respondents' attempt to characterize the decision below as limited to its "unique set of facts" (Br. in Opp. at 17) completely ignores the immediate practical effect of the decision below on the timber industry and the serious risk that the Ninth Circuit's unprecedented "implicit consent" theory will encourage other resource-rich states to enact similar protectionist legislation. Indeed, the Oregon experience provides a concrete illustration of what is likely to happen in other jurisdictions if the decision below is left

standing. Oregon, like Alaska, has a statute that prohibits the export of unprocessed logs into foreign commerce. (Or. Rev. Stat. § 526.805; Pet. App. at 37a-38a.) Prior to the decision below, the constitutionality of the Oregon statute had been questioned by the State Attorney General,¹ and, therefore, had not been enforced. Since the decision below, the export ban has been effectively reinstated.² Consequently, some 926,000 acres of timberland in Oregon are once again subject to the Oregon export ban. (See Pet. App. at 54a.)

Nor is the problem restricted to Oregon. As the petition shows, the timber industry already faces statutes restricting the export of unprocessed logs in three other western states, and the threat of similar restrictions in another. (Pet. at 14-15.) Thus, even if the Ninth Circuit's decision were capable of being read as restricted only to the timber industry, its detrimental impact would be substantial.

¹ The Oregon Attorney General had concluded that the state export ban was "probably unconstitutional." (See Pet. App. at 42a.) In particular, the Attorney General concluded: "Oregon, we believe, may not [restrict the export of unprocessed logs from] its own lands, and Congress has not given it permission to do so." (See Pet. App. at 48a-49a.) The Attorney General relied in part on the district court decision in this case in reaching this conclusion. (See Pet. App. at 47a.)

² As a result of the Ninth Circuit's decision, the Attorney General revised his views on the constitutionality of the Oregon export ban. In a letter to the State Forester, the Attorney General, while noting that there are "substantial grounds for a United States Supreme Court challenge to the Ninth Circuit decision," concluded: "there is no present basis upon which to conclude that the courts would find the Oregon statutes to be invalid." (See Reply Br. App. at 1a.) Significantly, the constitutionality of the Oregon restraint is currently the subject of litigation. See *Bohemia Inc. v. Oregon*, No. 82-1200 (Coos County Cir. Ct. filed June 25, 1982). In addition, as explained in the petition, there is considerable confusion in the Oregon legislature as to the scope of the Ninth Circuit's decision. (See Pet. at 15.)

As a matter of fact, however, the Ninth Circuit gave no indication whatsoever that its aberrant "implicit consent" theory was limited to the precise facts presented, as respondents would have this Court believe. States have often sought to justify such protectionist legislation by claiming—until now unsuccessfully—that the federal government had given "implicit consent" to the state action. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980). Other states have enacted restrictions on exporting other natural resources (*see* Pet. at 16); the decision below—with its indeterminate "implied consent" theory—is likely to provide support for other attempts to enact similar discriminatory legislation.

B. The State Restraint At Issue Has A Substantial Impact On Foreign Commerce.

Respondents' assertion that Alaska's primary manufacture requirement "has no significant impact on foreign commerce" (Br. in Opp. at 6) is inconsistent with the district court's uncontroverted findings. As respondents admit, the state owns approximately 21% of the commercial timberland in Alaska. (Br. in Opp. at 16 n.10.)³ Furthermore, exports account for over 90% of the sales of Alaskan timber products. (Pet. at 3 n.2.) Thus, the decision below clearly authorizes the state to restrain foreign commerce to a significant degree. As the district court

³ Respondents attempt to underplay the practical market impact of Alaska's export prohibition by asserting that the state is "only one of many owners of commercial timber land in Alaska. . . ." (Br. in Opp. at 13.) This is disingenuous, at best. As the respondents point out (Br. in Opp. at 16 n.10), Alaska owns approximately 21% of the commercial timberland in the state, which means that the state owns over eight times the amount of commercial timberland owned by all private parties. (*See* Pet. App. at 54a.)

specifically found: "the primary manufacture requirement places a substantial rather than an incidental burden on commerce." (511 F. Supp. at 143; Pet. App. at 15a.)

Respondents' argument that foreign trade is no more limited than it would be if the state had decided not to sell its timber at all is similarly flawed. A state cannot *discriminate* against constitutionally protected commerce. Indeed, if respondents' argument were valid, a state-owned restaurant could justify racial discrimination on the ground that those discriminated against were no worse off than they would be if the restaurant simply closed its doors. Of course, the restaurant may close its doors, but if it is open for business its practices must comply with the Fourteenth Amendment. Similarly, a state may decide not to sell its timber; once it makes sales, however, it must comply with the Commerce Clause.

Finally, respondents' contention that "the impact of Alaska's primary manufacture requirement on foreign commerce is significantly less than the impact of the congressionally approved federal processing requirements" (Br. in Opp. at 15-16) is irrelevant. More importantly, this contention ignores the fundamental distinction between federal and state regulation of foreign commerce. It is one thing for the federal government—the political body with responsibility for foreign policy—to impose a restraint on foreign commerce, even at the price of injuring diplomatic relationships with foreign nations. It is quite another thing for an individual state, acting solely to protect local economic interests, to place a substantial restraint on foreign commerce. The

constitutional impropriety of Alaska's interference with a sensitive federal function is clear.⁴

C. The Ninth Circuit's "Implicit Consent" Theory Is Inconsistent With Prior Decisions Of This Court Requiring Express Federal Approval Of State Action That Would Otherwise Violate The Commerce Clause.

Respondents rely heavily on this Court's recent decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983), to support their "implicit consent" theory. This reliance is based on a transparent revision of this Court's holding in *White*. Contrary to respondents' argument, this Court did not rely on "general congressional statements of policy" (Br. in Opp. at 9) in upholding the executive order at issue in *White*. Rather, this Court found *specific federal approval*, noting specifically that "the federal regulations for each program affirmatively permit[ted] the type of parochial favoritism expressed in the order." 103 S. Ct. at 1047.⁵

Similarly, respondents assert that "[a]lthough the court of appeals did not cite it as precedent, *Parker v. Brown*, 317 U.S. 341 (1943), also supports the decision in this case." (Br. in Opp. at 10 n.5.) The Ninth Circuit had good cause for not relying on *Parker*. There, unlike here, the United States Secretary of Agriculture had affirmatively cooperated in promoting the state program and aided it through substantial federal loans. In *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), this

⁴ As this Court stated in discussing the Import-Export Clause: "the Federal Government must speak with one voice when regulating commercial relations with foreign governments. . . ." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

⁵ The Court set forth the pertinent federal regulations which "affirmatively sanctioned" the Mayor's order. See 103 S. Ct. at 1047 n.11.

Court made clear that such affirmative expressions of federal approval are essential if state actions otherwise inconsistent with the Commerce Clause are to withstand constitutional scrutiny. As this Court stated: "It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity." *Id.* at 543.⁶

Neither respondents nor the Ninth Circuit have ever explained how the federal government has, in any way, expressed its approval of the *State of Alaska's* restraint on interstate and foreign commerce.⁷ There has been no answer to the district court's conclusion that "[a]n examination of the relevant statutory provisions shows that Congress has not consented to any primary manufacture requirements imposed *by the states*." (511 F. Supp. at 141; Pet. App. at 12a)(emphasis added). Consequently,

⁶ In *Hood*, this Court held invalid a New York restraint on commerce intended to protect and advance local economic interests. The Court distinguished *Parker* in this fashion: "Another element in the *Parker* case which led the Court to sustain the California regulation was that it was one which the policy of Congress was to aid and encourage, and the Secretary of Agriculture had approved the State program by loans." 336 U.S. at 537. "There is no such financial support [here] as was given in *Parker v. Brown*, 317 U.S. 341." *Id.* at 542.

⁷ Respondents' argument that Alaska's primary manufacture requirement is justified because it is a continuation of federal timber policy that preexisted Alaska's statehood is meritless. It is well-established that new states enter the Union on an "equal footing" with other states. See, e.g., *United States v. Texas*, 143 U.S. 621, 634 (1892); *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883). Thus, absent an affirmative expression of federal approval for the *State of Alaska* to undertake the protectionist activity in question, Alaska has no greater authority to ignore the negative implications of the Commerce Clause than any other state.

Alaska's export ban runs afoul of the fundamental Commerce Clause concern that "a legislature representative of the people whose significant interests are affected . . . [have] made the decision [in question]." O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 Or. L. Rev. 395, 400 (1982).

D. The Market Participant Exemption Does Not Apply When A State Seeks To Attach Conditions To The Use Or Disposition Of State-Owned Natural Resources It Sells In Commerce.

Respondents rely extensively on the market participant doctrine⁸ in an attempt to justify Alaska's local processing requirement. This issue was not addressed by the Ninth Circuit. In any event, the market participant exemption is not available here, as the district court held. (511 F. Supp. at 143; Pet. App. at 14a.)

Despite respondents' protestations to the contrary, a state's ownership of a natural resource does not justify every protectionist measure associated with that resource.⁹ Unlike the situation in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), this case involves a natural resource, not "the end product of a complex process whereby a costly physical plant and human labor act on raw mate-

⁸ See *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

⁹ In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), a privileges and immunities case, this Court made it clear "that the fact that a State owns a resource [does not], of itself, completely [remove] a law concerning that resource from the prohibitions of the Clause." *Id.* at 528. (This Court has emphasized that the Privileges and Immunities Clause and the Commerce Clause have a "mutually reinforcing relationship." *Id.* at 531.)

rials." *Id.* at 444.¹⁰ Furthermore, Alaska is not acting as a market participant in the timber milling business—the business being protected. Instead, Alaska has attempted to use its prior ownership of the timber to extend a locational monopoly to a private party, Kenai Lumber Co., a local processor.¹¹ Moreover, the local processor is not subject to "active state supervision" in its dealings with timber owners such as petitioner. *Cf. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

In sum, the market participant exemption is not available here. As the district court concluded: "While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not 'attach conditions to the use or disposition of the resource that might independently burden interstate commerce. . . .'" (511 F. Supp. at 143; *Pet. App.* at 14a) (quoting *Hellerstein, Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 79 (1980)).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, because the decision below is in direct

¹⁰ In *Reeves*, this Court distinguished the product there involved—cement—from "natural resources[s], like coal, timber, wild game, or minerals." 447 U.S. at 443. Here, the timber is "by happenstance," *id.* at 444, found within Alaska's borders. Furthermore, contrary to respondents' assertion (*Br. in Opp.* at 12), there is no evidence in the record to support its contention that "the state-owned timber in this case represents an investment of tax dollars." (*Id.*)

¹¹ As noted in the petition, the timber at issue here is located in a remote area, and the only available site to process the timber is a mill owned by Kenai Lumber Company, intervenor-respondent in this case. (*See Pet.* at 5 n.4.)

conflict with prior decisions of this Court, petitioner respectfully suggests that summary reversal would be appropriate.

Respectfully submitted,

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June, 1983

APPENDIX
OREGON ATTORNEY GENERAL'S LETTER
OPINION

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December 14, 1982

H. Mike Miller
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Dear Mr. Miller:

On February 23, 1982, we provided your office with a copy of our letter opinion OP-5216 dated February 19 to Representative Bugas, relating to export of logs from state lands. Our opinion stated that ORS 526.805 and 526.835 were probably unconstitutional, but we deferred a definitive conclusion because of a case then pending before the Ninth Circuit Court of Appeals.

The case of *South-Central Timber Development, Inc. v. Le Resche*, has now been decided by the Ninth Circuit. You have a copy of the opinion, issued December 10, 1982. The issues in that case, arising out of an Alaska log export ban, differed to some extent from the issues arising out of the Oregon statutes. However, the court sustained an Alaskan statute which was even more restrictive than the Oregon statutes. Accordingly, there is no present basis upon which to conclude that the courts would find the Oregon statutes to be invalid.

Counsel for the plaintiff in the *South-Central Timber Development* case inform us that no decision has been made whether to petition the United States Supreme Court for a Writ of Certiorari (review). We do see substantial grounds for a United States Supreme Court challenge to the Ninth Circuit decision, but we cannot predict whether a petition will be filed. Moreover, there is no basis to evaluate the chances of reversal

in the Supreme Court without an opportunity to review the appeal petition.

At this time, the Ninth Circuit decision must be treated as the law applicable to the states (including Oregon) included within its jurisdiction. This means that ORS 526.805 and 526.835 are within the authority of the State of Oregon to enact and enforce, and are valid except to the extent they apply to timber on Common School Fund lands. (Such timber will be further discussed below.)

ORS 526.805 requires timber (except white cedar) "sold by the State of Oregon, or any of its political subdivisions," to be primarily processed in the United States. ORS 526.835 makes it a *misdemeanor* to purchase or sell such unprocessed timber for delivery outside of the United States. ORS 526.815 to 526.825 formerly imposed certain responsibilities on the Department of Forestry with respect to export permits, but those statutes were repealed in 1981. The Department of Forestry thus may not sell logs under a contract requiring it to deliver outside of the United States. However, the Department of Forestry has no responsibility after sale for whatever disposition the purchaser makes of the logs. Responsibility to enforce ORS 526.835 rests entirely upon the district attorneys.

The department therefore *may* but is *not required* to insert a provision in its contracts requiring primary processing in the United States or otherwise referring to ORS 526.805 and 526.835. To the extent it does so, it undertakes a responsibility which is not required, and which is uncertain in its measurements. We have previously noted that it would be proper to delete such contract provisions and include them if the Oregon statutes are deemed valid. The point to be emphasized is that whether to include the clauses is a policy question. If such a clause is inserted, its breach (in addition to constituting a violation of law) may give rise to a right of the department to terminate the contract and, it could be asserted, to a duty to do so. There would probably be no recoverable damages. If department rules or the contract so provide, such a breach could

disqualify the purchaser from future contracts. If the department decides to include the provision, it should do so as a matter of policy, recognizing that it arguably thus takes on at least some investigative and enforcement responsibilities which the legislature intended district attorneys to bear. We must assume the legislature intended enforcement of the export ban to be the district attorney's responsibility when criminal sanctions were provided.

The department has no responsibility with respect to exports in violation of the statutes occurring before the Ninth Circuit decision was rendered. We also believe any prosecution for such exports would be inappropriate.

The department has the same responsibility with respect to unlawful exports occurring in the future as any private citizen or state agency. It is appropriate to call the attention of the appropriate law enforcement agency (in this case the district attorney) to any violation of law of which one becomes aware.

The department undoubtedly has entered into many contracts for sale of logs, since the date of our opinion OP-5216, in which the purchasers contemplated export of the logs notwithstanding ORS 526.805 and 526.835. We plainly stated that our opinion was preliminary and conditional. Our opinion concluded:

"Whether in light of this opinion [a purchaser] is willing to [export state logs] is a matter for that purchaser to decide on the basis of its own counsel."

If purchasers contracted for purchase of logs, intending to export them, in reliance on our opinion and not on the opinion of their own counsel, they did so contrary to our advice. If they now decide that they cannot risk any additional log exports, that is not grounds for rescission of the uncompleted portion of any contract. Any such contracts were entered into with full knowledge of the statutes and pendency of the Ninth Circuit case, and in contemplation of the risk that the court would uphold the authority of the State of Alaska (and by clear

inference, the State of Oregon) to impose a prohibition on export.

We referred above to timber on Common School Fund lands. In our opinion OP-5216 of February 19 we said:

"[T]he State Land Board has ultimate authority to manage the constitutional Common School Fund lands, and that the legislature cannot deprive it of this authority. *If* ORS 526.805 and 526.835 are valid, they are valid because the state owns the logs involved. As applied to constitutional Common School Fund lands, the legislature does *not* have authority to act as owner. The State Land Board has that authority. If applied to those lands, and if so doing would impair the ability of the State Land Board to sell timber on the most advantageous terms, ORS 526.805 and 526.835 would impair the authority of the Land Board to manage. We therefore unequivocally state that these statutes cannot constitutionally be applied to sale of logs from constitutional Common School Fund lands, *if* the Land Board finds that sale for export would be a proper management decision."

We adhere to this conclusion, based upon the Oregon Constitution. The Ninth Circuit decision does *not* affect timber on Common School Fund lands. If the Land Board makes appropriate findings, such timber may be sold for export and exported, and ORS 526.805 and 526.835 do not apply.

Yours Truly,

/s/ Dave Frohnmayer
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Attorney General

DF:JAR:nh

MOTION FILED
APR 26 1982

No. 82-1608

In the Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

ESTHER WUNNILKE V.

~~ROBERT LARESCH~~, Commissioner of Department of
Natural Resources of the State of Alaska, et al., *Respondents,*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF
PACIFIC RIM TRADE ASSOCIATION AND
WASHINGTON CITIZENS FOR WORLD TRADE
IN SUPPORT OF PETITION FOR CERTIORARI

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**MOTION OF PACIFIC RIM TRADE ASSOCIATION AND
WASHINGTON CITIZENS FOR WORLD TRADE
FOR LEAVE TO APPEAR AS AMICI CURIAE
IN SUPPORT OF PETITION FOR CERTIORARI**

Pacific Rim Trade Association and Washington Citizens for World Trade, nonprofit corporations whose members include companies, labor unions and public agencies engaged in or associated with foreign trade in the Pacific Northwest, respectfully move pursuant to Rule 36.1 of the Rules of this Court for leave to appear as *Amici Curiae* and to file the attached Brief supporting the Petition for Certiorari of South-Central Timber Development, Inc. The interest of *Amici Curiae* is stated in the attached Brief (*infra*, pp 1-2). Petitioner has consented to the filing of the Brief; Respondent Kenai Lumber Company, Inc. states it is undecided; and the State Respondents have conditioned their consent. This has required *Amici Curiae* to proceed by motion.

Respectfully submitted,

April 20, 1983.

.....
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**BRIEF OF AMICI CURIAE
PACIFIC RIM TRADE ASSOCIATION AND
WASHINGTON CITIZENS FOR WORLD TRADE
IN SUPPORT OF PETITION FOR CERTIORARI**

INTEREST OF AMICI CURIAE

Amici Curiae are nonprofit corporations whose members are engaged in or associated with foreign trade in the Pacific Northwest.¹ Many of their members are in the business of exporting unprocessed logs and other wood products from northwest ports to Japan and other markets in the far east. An important source of such products in western states is publicly-owned timber which is cut and removed under contracts with state and local governments. Foreign trade in these products is large, and could be drastically affected by log export prohibitions imposed by the states to protect local economic interests.

In its *South-Central* decision, the Ninth Circuit Court of Appeals has announced an unprecedented rule of implied Congressional consent to state burdens on foreign trade, and thereby sustained Alaska's requirement that the "primary manufacture" of logs sold and removed from state lands be performed in Alaska. The result of that decision is to prevent persons in the log export trade from purchasing state timber in Alaska and to eliminate unprocessed logs sold and removed from state lands from the export market.

Other Ninth Circuit states have similar restric-

¹ The membership of each is set forth at 1a-2a infra.

tions on exporting logs removed from state and other nonfederal public lands. The *South-Central* decision, and specifically the court's novel doctrine of implied Congressional consent to local regulation of foreign trade, tends to support the validity of such statutes, which are a serious threat to international trade conducted by members of these trade groups.

SUMMARY OF ARGUMENT

1. The Alaska regulation is an attempt by a resource-rich state to reserve its raw materials for exploitation by local business interests. Alaska acts as a market regulator, not a proprietor, because the restriction applies only after a sale and restricts the disposition of privately owned logs to third parties. The Alaska regulation constitutes economic protection that is invalid virtually *per se*.

2. The Ninth Circuit's introduction of a broad and unprecedented doctrine of "implied Congressional consent" to sustain Alaska's protectionist scheme weakens the protection of foreign trade under the Commerce Clause and creates harmful uncertainty about the validity of such restraints. The assertion that Congressional consent to an otherwise invalid regulation of foreign or domestic commerce can be found by a process of implication has been repeatedly rejected — twice during the past term — and is particularly harmful and unsettling on a record that shows no more than a consistency between the Alaska

regulation and the regulation of timber harvests on some, but not all federal lands.

3. Congress has repeatedly declared that the free export of natural and manufactured products constitutes our basic national policy, which is inconsistent with a theory of implied consent to log export restrictions. If the Ninth Circuit's doctrine of implied consent is to be recognized, it should be established and defined by this Court.

ARGUMENT

1. The South-Central Case Presents Important Commerce Clause Questions Which This Court Should Review.

This case presents two issues of importance to the nation's foreign trade. First, the Court of Appeals announced a rule of implied Congressional consent allowing states to burden foreign trade, which weakens the protection given it under Article I § 8 of the United States Constitution. If there is such a rule, it is a new and important one that should be announced by this Court, and should not prevail, even in four Ninth Circuit states that have enacted these export barriers, on the basis of an opinion that lacks any reference to supporting authority and fails to consider recent contrary decisions of this Court.

Second, the export restrictions in question are imposed on the resale or other disposition of goods that the state has sold and no longer owns. The Court

should review *South-Central* to determine the application of *White v. Massachusetts Council of Construction Employers*, (1983) — U.S. —, 51 L.W. 4211 to the nation's export trade and define the "limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business." 51 L.W. at 4213, n 7.

So long as they are unresolved, these questions will create uncertainty about the freedom of the nation's trade, domestic and foreign, from state regulations that protect local economic interests. They urgently require the Court's attention.

2. Statutes in Four Western States Limit the Export of Unprocessed Logs.

The export trade in unprocessed logs removed from nonfederal public lands in the Pacific Northwest faces destructive regulation in four states, and the threat of such regulation in another. The purpose and effect of these restrictions is to reserve the logs for local processors by banning their export in an unprocessed state.

The legislative format varies. Alaska's Administrative Code requires that "primary manufacture" of the logs be performed in Alaska.² Statutes in Cali-

² The Alaska regulation is found at Pet. 19a-21a. At the time of this action, round logs underwent "primary manufacture" when they were sawed into "squares" or "cants" 12 inches on a side or less; present regulations reduce the maximum size to eight and three-quarter inches. Pet. 20a.

ifornia and Oregon apply directly to foreign trade, by prohibiting the export of unprocessed logs sold and removed from state land, a ban which Oregon enforces with criminal as well as civil penalties. Idaho prohibits the movement of unprocessed logs in either interstate or foreign commerce.³

The district court concluded that the requirement of "primary manufacture" in Alaska violates the Commerce Clause by restraining foreign commerce to protect local economic interests. 511 F. Supp. at 143-44. The Court of Appeals did not disagree; however, it found implied Congressional permission for such local restraints in federal policies governing the export of logs from federal lands in Alaska and other parts of the country. 693 F2d at 892-93. That process of implication has no precedent in the decisions of this Court — indeed, the Court of Appeals cited nothing from this or any other court supporting such a rule. As described and applied by the Ninth Circuit, it is not only novel, but broad; it has no top and no bottom, and can be applied, with the most damaging consequences to foreign trade, by courts considering analogous statutes of other states.

³ California forbids the sale or resale of state timber to any "primary manufacturer" for use outside the United States unless it has been sawn into 4" by 12" dimensions. Cal. (Pub. Res.) Code § 4650.1 (West). Oregon requires logs removed from state or local public land to be "primarily processed in the United States," and it is a misdemeanor to purchase or sell timber from public land for delivery outside the United States in log form. ORS 526.805 - 526.835. Idaho requires logs removed from state lands to be manufactured into lumber or timber products within the state. Idaho Code § 58-403.

3. A Large and Significant Amount of Foreign Trade is Affected by State Laws Limiting Log Exports.

Exports account for 93% of sales of the products of Alaska timber, and virtually all are destined for Japan.⁴ In 1980 Japanese purchasers bought 156,000,000 board feet of unprocessed logs from Alaska vendors worth more than \$83 million,⁵ mostly from Indian tribes that are not subject to export restrictions. Due to the distance and to shipping costs under the Jones Act, 46 U.S.C. § 883, there is no interstate market for Alaska wood products, and the principal burden of the State's primary manufacture rule falls on trade with Japan.

Japan is also a large purchaser of unprocessed logs in other major exporting centers in the Ninth Circuit (Oregon, Washington and northern California), accounting for 89% of such sales in 1980.⁶ In that year, export purchases of logs to all countries amounted to a little less than \$85 million in Alaska, \$16 million in northern California, \$277 million in Oregon, and — significantly — \$1.034 billion in Washington, which does not restrict log exports.⁷

These are large numbers, and the Ninth Circuit's decision in *South-Central* is obviously important to the international trade of these states. Like any other

⁴ Kerr & Wibbenmeyer, *Alaskan Export Policy* at 26, 33 (1979).

⁵ F. Ruderman, *Production, Prices, Employment and Trade in Northwest Forest Industries, Second Quarter 1982* at 19 (United States Forest Service, 1982).

⁶ Ruderman, *supra*, at 10, 16.

⁷ Ruderman, *supra*, at 17-19.

decision sustaining the local regulation of commerce, it tests the country's commitment, under the Commerce Clause, to international trade regulated by Congress for national, not local, purposes.

4. Statutes Limiting Log Exports are an Unconstitutional Restriction on Access to a State's Natural Resources.

The Commerce Clause "precludes a State from mandating that its residents be given a preferred right of access over out-of-state consumers to natural resources located within its borders or to the products derived therefrom." *New England Power Co. v. New Hampshire*, (1982) 455 U.S. 331, 332.⁸

There is no doubt at all about the reason for restricting the Icy Cape sale. It was done to reserve the logs for local processors, as a "short-term cushion to the existing industry,"⁹ after the Alaska House and Senate passed resolutions requesting the Governor to act "to provide local employment as well as building materials for the Alaska market."¹⁰ Such regulations

⁸ See also *Hughes v. Oklahoma*, (1979) 441 U.S. 332, 337-38; *Pennsylvania v. West Virginia*, (1923) 262 U.S. 553, 599-60; *West v. Kansas Natural Gas Co.*, (1911) 221 U.S. 229, 260-61; *Hicklin v. Orbeck*, (1978) 437 U.S. 518, 528-533.

In *Reeves Inc. v. Stake*, (1980) 447 U.S. 429 the Court pointed out that "[c]ement is not a natural resource, like coal, timber, wild game or minerals * * * South Dakota has not sought to limit access to the State's limestone or other materials used to make cement." 447 U.S. at 434, 443-44; emphasis added.

⁹ Letter from Governor Jay Hammond to Lionel Drage, August 8, 1980 (Ex H in the District Court).

¹⁰ Exs A and B to Plaintiff's Motion for Summary Judgment (Excerpt of Record in the Court of Appeals at 73).

require "business operations to be performed in the home State that could more efficiently be performed elsewhere," *Pike v. Bruce Church*, (1970) 397 U.S. 137, 145, and are indistinguishable from other restraints on commerce in raw materials that this Court has repeatedly held invalid. *Baldwin v. Seelig*, (1935) 294 U.S. 511, 522-24 (local milk reserved for local processors); *Foster-Fountain Packing Co. v. Haydel*, supra, (1928) 278 U.S. 1, 10 (locally harvested shrimp reserved for local processors).

5. Log Export Limitations are an Unconstitutional Regulation of the Buyer's Downstream Transactions with Third Parties.

In the district court, Alaska argued that its program is valid under the "proprietary" exception to the Commerce Clause, because the export restriction applies only to logs sold and removed from state lands, and in making such sales the state trades in the open market as a proprietor and, like a private party, can choose its trading partners. *Hughes v. Alexandria Scrap Corp.*, (1976) 426 U.S. 794, 809; *Reeves Inc. v. Stake*, supra, (1980) 447 U.S. 429, 437, 443.

This, however, does not permit a state, as in this case, to regulate the distribution of products which it has sold and no longer owns. In offering the Icy Cape timber for sale, Alaska's proposed contract stipulated that the timber would be cut and the logs scaled in the forest; payment would be due the following month. Ownership would pass when the timber was "paid for, cut and scaled" (Ex D in

the District Court, §§ 11, 49). That done, the logs are the buyer's property, and Alaska is not a party to or concerned with their resale. However, the requirement of "primary manufacture" within Alaska prohibits their resale for export solely to protect Alaska's processors.

In *White v. Massachusetts Council of Construction Employers*, supra, (1983) — U.S. —, 51 L.W. 4211 the Court sustained, as a proprietary act, a municipal regulation requiring public contractors to reserve a proportion of jobs under city contracts for local unemployed workers. It did so over the objection that the rule affected contracts between the contractors and their employees. The Court recognized, however, that there are "limits" to restrictions that reach beyond the immediate parties to the state's own contract. The city had not transgressed those limits, because it had such control over the work as to be a virtual employer of the construction workers.

A regulation, like Alaska's log export ban, that forbids the export of raw materials after the state has sold them, raises different constitutional considerations: First, this Court has recently reaffirmed the principle that

"[a] State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *Philadelphia v. New Jersey*, (1978) 437 U.S. 617

at 627, quoting from *Foster-Fountain Packing Co. v. Haydel*, (1928) 278 U.S. 1, 10.

Second, the State of Alaska is not, "in a substantial sense" or otherwise, an "employer" of the buyers or their Japanese customers, and has no interest, as owner or contractor, in regulating the subsequent sale of the logs. This is a case, pure and simple, of downstream regulation to protect local interests. The Alaska regulation excludes from the foreign market unprocessed logs that the state has sold and been paid for, in order to supply the needs of local mills. Such regulation is "a 'protectionist measure' subject to the rule of virtual *per se* invalidity established by many of this Court's cases." *White v. Massachusetts Council of Construction Employers*, *supra*, (1983) — U.S. —, 51 L.W. 4211, 4216 (Blackmun, J., dissenting).

6. The Process of Implication Announced by the Court of Appeals is a Dangerous and Incorrect Construction of This Court's Decisions.

State restrictions on foreign commerce are subject to "more extensive constitutional inquiry" than restraints on domestic commerce. *Japan Line Ltd v. County of Los Angeles*, (1974) 441 U.S. 434, 446. The Court of Appeals did not make that inquiry. Instead, it found "implied" Congressional approval of the Alaska program in federal legislation and administrative rules establishing policies for administering federal, not state, lands. Such "implied" authority has never been a source of consent for state burdens limiting commerce and the contention that it is was re-

jected twice in the last Term, in cases the Court of Appeals did not even cite. *New England Power Co. v. New Hampshire*, supra, (1982) 455 U.S. 331; *Sporhase v. Nebraska ex rel Douglas*, (1982) — U.S. —, 73 L. Ed. 2d 1254.¹¹

Congressional permission to the states to burden commerce cannot be implied, but must be explicit. Mere consistency between federal policy governing federal activities and restraints imposed by the state does not show that Congress has authorized state regulation of commerce; indeed, "coincidence is as fatal as conflict." *Hood v. DuMond*, (1949) 336 U.S. 525, 543. This is so not because a process of implication is tainted; it is necessary because protectionist state legislation is a continuing problem — as the reports of each Term of this Court's work demonstrate — that threatens basic constitutional arrangements. The necessary protection of domestic and foreign commerce from restrictive state legislation requires a high degree of compliance with controlling constitutional standards.

This requirement of explicitness must be even more exacting when a state attempts to restrict foreign commerce, which is "inherently national [in]

¹¹ In *White v. Massachusetts Council of Construction Employers*, supra, (1983) 51 L.W. 4211 the city's authority to burden the interstate labor market with "local hire" rules was, as to federally funded projects, "specifically authorized by Congress," and the Court identified federal regulations that required the city to reserve jobs for local unemployed workers. 51 L.W. at 4218-14.

character.”¹² Such regulation intrudes into the field of foreign affairs, and is forbidden whether or not it is consistent with American foreign policy. *Zschernig v. Miller*, (1968) 389 U.S. 429, 434-35, 441.

7. Federal Legislation Supporting Export Trade Forecloses Any Implication of Congressional Authorization to Destroy Foreign Trade by Restricting Log Exports.

If there were a principle of implied Congressional consent, none can be found in this case; the Court of Appeals' decision is contradicted by a national policy, embodied in Acts of Congress, which vigorously supports the nation's export trade in natural and manufactured products and affirmatively disapproves local restraints upon it.

First, the Trade Act of 1974, 88 Stat. 1978, establishes “reciprocal nondiscrimination” as this country's policy to be followed with “major industrial” trading partners, including Japan. 19 U.S.C. § 2136. In “a unique Constitutional experiment”¹³ involving the “largest delegation of trade negotiating authority to the Executive in history,”¹⁴ the President is authorized to “take all appropriate and feasible steps” to “harmonize, reduce or eliminate” nontariff trade barriers. 19 U.S.C. § 2112.

Second, the Trade Agreements Act of 1979, 93

¹² Tribe, *American Constitutional Law*, § 4-5 at 172, § 6-20 at 369-70 (1978). See also *United States v. Pink*, (1942) 315 U.S. 203, 233; *Hines v. Davidowitz*, (1941) 312 U.S. 52, 68; *United States v. Belmont*, (1957) 301 U.S. 324, 331.

¹³ S. Rep. No. 96-249, 96th Cong., 1st Sess. 391 (1979).

¹⁴ S. Rep. No. 93-1298, 93d Cong., 2d Sess. 7196 (1974).

Stat. 144, prohibits states, federal agencies and private persons from engaging in "standards-related activity" ¹⁵ that "create[s] unnecessary obstacles to the foreign commerce of the United States." 19 U.S.C. § 2532, 2533.

Third, the Export Administration Act of 1979, 93 Stat. 503, declares that it is the "policy of the United States" to encourage foreign exports, 50 U.S.C. app. § 2401(3), 2402(1), particularly exports of agricultural commodities and products, 50 U.S.C. app. § 2402(11), unless such exports will significantly impair our national security. 50 U.S.C. App. § 2402(2)(A). Agricultural exports can only be restricted if the Secretary of Agriculture approves, 50 U.S.C. app. § 2406(G)(1), ¹⁶ except where the President imposes export controls

"* * * to further significantly the foreign policy of the United States or to fulfill its declared international obligations." 50 U.S.C. app. § 2405(a).

The applicable policy of the United States concerning export trade is found in these statutes, not in administrative policies that regulate federal lands, and is

¹⁵ 19 U.S.C. § 2571(13) defines "standards" to include "(A) The specifications of the characteristics of a product, including * * * dimensions."

¹⁶ The Act forbids the export of Alaskan crude oil, 50 U.S.C. app. § 2406(d), and western red cedar, 50 U.S.C. app. § 2406(i). An uncodified appropriation rider has exempted the State of Alaska from the red cedar restriction since November 1979. P.L. 96-126, Title III § 308, Nov. 27, 1979, 93 Stat. 980.

inconsistent with the Alaska requirement of "primary manufacture."

Federal policies referred to by the Court of Appeals do not support its decision. The principal one is in a forest service regulation forbidding the export of round logs from forest service land in Alaska without the Regional Foresters' permission. 36 C.F.R. 223.10 (c). However, the attached policy statement states that the regulation is intended to apply only if it will not prevent the full utilization of the timber and will facilitate a sustained yield program. That harvest policy does not fit this case. Respondents admittedly imposed the ban on the Icy Cape sale to protect employment at local mills, and Alaska has admitted that conditions at Icy Cape do not permit a sustained yield harvest. Answer, ¶ 22.

Similarly, federal statutes do not support an inference of Congressional consent for states to prohibit the export of unprocessed logs from nonfederal public lands. They show only diverse, *ad hoc* policies for various federal timber holdings, and no policy at all for state and private lands.¹⁷

a. The Organic Act of June 4, 1897 authorizes the

¹⁷ A staff report published January 6, 1983 by the Joint Legislative Committee on Trade and Economic Development of the Oregon Legislature expresses concern and confusion over the *South-Central* decision. It points out that a doctrine of "implicit congressional approval" has never been enunciated by this Court, and suggests that a court "could as easily find that Congress has repeatedly decided *not* to restrict the export of logs from timber on *non-federal owned lands*." *Final Draft The Log Export Issue: An Analysis*, at 23; emphasis in the original.

(Footnote continued)

Forest Service to sell national forest timber for use " * * in the state or territory in which such timber reservation may be situated * * * but not for export therefrom." 16 U.S.C. § 476. However, every annual appropriation act from 1917 through 1926 authorized the Secretary of Agriculture to permit exports, 16 U.S.C. § 491, and the Act of April 12, 1926, 44 Stat. 242, provided permanent authority to export logs from national forests and the Territory of Alaska if "the supply of timber for local use will not be endangered thereby." 16 U.S.C. § 616. On January 26, 1928 the Secretary amended Regulation S-2 by prohibiting the export of logs from Forest Service lands from the territory of Alaska without the Forester's permission. The amended regulation is substantially identical to 36 C.F.R. § 223.10(c), which replaced it.

b. A 1968 statute, 16 U.S.C. § 617, established an export quota for logs from federal lands west of the 100th meridian. From 1969 through 1971 it allowed the export of 350 million board feet per year, except for species and amounts determined to be surplus. That quota was extended for two years by PL. 91-609, but expired in 1973, when it was replaced by a series of annual riders to appropriation acts which prohibit

(Footnote continued)

This conclusion is also supported by Congress' refusal to enact a nationwide log export ban. See S. 1033, 1507, 1775 and 1820, 92d Cong., 1st Sess. (1973). The leading bill, S. 1033, did not come to a vote after President Nixon concluded an agreement on May 14, 1973 with the Japanese government to limit exports to that country. S. Rep. No. 93-198, 93rd Cong., 1st Sess., *"Softwood Log and Lumber Export Restrictions,"* 6, 10-12 (1973).

the Secretaries of the Interior and Agriculture from using appropriated funds to export timber from federal lands west of the 100th meridian in the contiguous 48 states. See, e.g., PL. 96-126 § 301, 93 Stat. 979, which was in effect when this action was filed.

The Forest Service thus has not one, but three log export policies, all limited to federal timber: one for Alaska under the 1926 Act; a second for lands in states west of the 100th meridian under the Appropriation Act; and a third — free export — for national forest timber east of the 100th meridian.

c. The export policy of the Bureau of Land Management is generally consistent with the Forest Service policy applicable to lands west of the 100th meridian. 16 U.S.C. § 615a; 43 C.F.R. 5400.0-3(c) and (d). However, nearly all of the Bureau's lands in Alaska were conveyed to Native Americans under the Native Claims Settlement Act, 43 U.S.C. § 1621(k) (1), which contained a temporary restriction on log exports that expired in 1976. Logs from Native American lands in Alaska are freely exportable, and in 1981 149 million board feet were exported.¹⁸

d. Logs from land administered by the Bureau of Indian Affairs can also be exported, except logs removed from 61,000 acres near the Warm Springs Reservation in Oregon, which is subject to an export restriction that will expire in 1992. 86 Stat. 719.

¹⁸ Staff Report, note 15, *supra*.

e. The only federal statute directly affecting non-federal timber is the Export Administration Act of 1979, 50 U.S.C. app. § 2401, et seq, 93 Stat. 503, which bans the export of unprocessed western red cedar. Since November 27, 1979 Alaska has been exempt from that restriction. PL. 96-126, Title III, § 308, 93 Stat. 980.

This welter of conflicting statutes and regulations does not establish a congressional log export "policy" for federal lands, much less for state or other public lands, and certainly does not constitute Congressional "permission" for states to limit log exports. The willingness of the Court of Appeals to rely on such materials shows the risk to foreign trade that *South-Central* presents. This Court should review the principle of implication announced by that Court and either reject it or establish effective limits to avoid weakening important national objectives of the Commerce Clause.

CONCLUSION

Alaska's interference with log exports is part of a larger problem in the western states that threatens foreign trade in privately owned logs after their sale and removal from public lands. Such destructive regulation is easily transferable to other states that may wish to reserve natural resources for their own citizens. *Amici Curiae* respectfully urge the Court to grant the Petition and issue the Writ.

Respectfully submitted

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April 20, 1983.

APPENDIX

LIST OF MEMBERS OF
PACIFIC RIM TRADE ASSOCIATION
AND

WASHINGTON CITIZENS FOR WORLD TRADE

**Pacific Rim Trade
Association**

Atlas Steamship Co.,
Northwest
Brady-Hamilton Stevedore
Co.
Brusco Tow Boat Co.
Burlington Northern, Inc.
Caffal Bros. Forest
Products, Inc.
Cascade Shipping Co.
Central Dock Co.
Columbia River Bar Pilots
Coos Bay Ship Pilots
Crown Zellerbach
Corporation
Dant & Russel, Inc.
Dillingham Ship Repair
Dolphin Terminals
East Orient Timber Co.
Eureka Forest Products
Fibrex & Shipping Co., Inc.
General Steamship Corp., Ltd.
International Log Sales/
Bald Knob Land & Timber
International Longshoremen's
& Warehousemen's Union
International Shipping Co.
Jones Oregon Stevedoring
Company
Knappton Corporation
Knutson Towboat Co./
Log Storage
Koontz Machine & Welding,
Inc.

**Washington Citizens for
World Trade**

Allman Hubble Tug Boat
Company
Anderson & Middleton
Lumber
ASARCO
Norman Barnes & Co.
Burlington Northern, Inc.
Crown Zellerbach Corporation
Evans Engine & Equipment
Howard-Cooper Corporation
John Hoyne
International Longshoremen's
& Warehousemen's Union
ITT Rayonier, Inc.
Jones Washington
Stevedoring
Mayr Brothers Logging
Murray Pacific
Pacific Lumber & Shipping
Port of Anacortes
Port of Bellingham
Port of Everett
Port of Grays Harbor
Port of Longview
Port of Olympia
Port of Port Angeles
Port of Tacoma
E. R. Probyn
Roderick Timber Company
St. Regis Paper
Scott Paper
Seattle Stevedore Company
Washington Contract
Loggers Association

**Pacific Rim Trade
Association
(Continued)**

Longview Fibre Company
 Niedermeyer-Martin Co.
 North Bend Fabrication &
 Machine Inc.
 Olympic Steamship Co., Inc.
 Oregon Small Woodlands
 Association
 Al Pierce Lumber Co.
 Port of Astoria
 Port of Coos Bay
 Port of Portland
 Riedel International, Inc.
 Shaver Transportation Co.
 United States Trading
 Company, Inc.
 Van Natta Brothers
 Westbrook Exports
 (Reservation Ranch)
 Western Equipment Co.
 of Eugene
 Western Transportation Co.
 Westfall Stevedore Co.
 Weyerhaeuser Company
 Williams, Diamond & Co.

**Washington Citizens for
World Trade
(Continued)**

Washington Farm Forestry
 Association
 Washington Public Ports
 Association
 Washington Trucking
 Association
 Weyerhaeuser Company

No. 82-1608

Office - Supreme Court, U.S.

FILED

SEP 7 1983

ALEXANDER L. STEVENS

In the Supreme Court of the United States

OCTOBER TERM, 1983

**SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER**

v.

ESTHER WUNNICKE

**~~ROBERT LERESCHE~~, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether federal statutes and regulations restricting the export of unprocessed timber cut from federally-owned land constitute congressional consent to an Alaskan statute imposing similar export restrictions on unprocessed state-owned timber.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1608

**SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER**

v.

**ROBERT LERESCHE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, ET AL.**

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

This brief is filed in response to the Court's order of June 13, 1983, inviting the Solicitor General to express the views of the United States. We conclude that the petition presents a question of law of substantial importance, that it was wrongly decided by the court of appeals, and that certiorari should be granted to review that judgment.

STATEMENT

The State of Alaska, by statute, authorizes the State Commissioner of the Department of Natural Resources to condition the sale of state-owned timber

on "primary manufacture" within the State. Alaska Stat. § 38.05.115 (1982); Pet. App. 19a-21a. The primary manufacture condition, which requires that the timber undergo certain processing in Alaska prior to export, parallels various federal statutes and regulations which restrict the export of unprocessed timber cut from federally-owned land. Pursuant to authority granted by Congress in the Organic Administration Act of 1897, 16 U.S.C. 475, 551 (Pet. App. 22a-23a), the Secretary of Agriculture since 1928 has restricted the export of unprocessed timber from national forest lands in Alaska.¹ 36 C.F.R. 223.10(c) (Pet. App. 35a). Exportation of logs cut from federal lands located west of the 100th meridian (a line running from central North Dakota through central Texas) was also limited from 1969 to 1973 by a quota set by Congress. 16 U.S.C. 617. The quota was replaced in 1973 by a series of annual riders to appropriation acts which prohibit the Secretaries of Interior and Agriculture from using appropriated funds to export timber from federal lands west of the 100th meridian in the contiguous forty-eight states. See, *e.g.*, Pub. L. No. 96-126, Section 301, 93 Stat. 979 (Pet. App. 29a). See also 43 C.F.R. 5400.0-3(c) (Department of Interior regulation implementing export ban).

Congress, however, has passed no law generally restricting the sale of timber from state-owned land. When it legislated under the Export Administration Act of 1979, 50 U.S.C. App. (Supp. V) 2406(i) (1) (Pet. App. 28a-29a) to specifically restrict the export of unprocessed western red cedar logs from state

¹ Exportation of privately-owned timber is also restricted to the extent such exports are made possible by the purchase of national forest timber. See 36 C.F.R. 223.10(a) (1), (4).

lands from 1979 to 1982 and ban their export thereafter, Alaska was specifically exempted from the restrictions and ban. See Pub. L. No. 96-126, Title III, Section 308, 93 Stat. 980 (1979) (Pet. App. 30a).

In 1980 the Commissioner of the Alaska Department of Natural Resources gave notice that a proposed sale of state timber would be conditioned on primary manufacture in Alaska. The condition was imposed in order to insure a continuing supply of timber for local processors during a period of temporary shortage of timber from federal lands. Pet. App. 2a-4a.

Petitioner, who does not own an operating mill in Alaska, brought the present action for injunctive relief in the United States District Court for the District of Alaska, asserting that the in-state primary manufacture requirement violates the Commerce Clause. U.S. Const. Art. I, § 8, Cl. 3. The district court granted petitioner's motion for summary judgment and issued a permanent injunction. Pet. App. 16a. The court found that the in-state processing requirement was not removed from Commerce Clause scrutiny by either congressional consent² or by the State's alleged status as a "market participant,"³

² The court found that, although Congress had authorized the imposition of export quotas on unprocessed timber from federal lands, "it has in no way expressly exempted state timber laws from commerce clause restrictions." Pet. App. 12a.

³ The State, relying on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), argued that it acted in a proprietary capacity as a "market participant," rather than as a "market regulator," when it imposed the processing requirement as a condition on the sale of its timber. The district court found that the primary manufacture requirement "goes beyond the *Alexandria*

but instead constituted an impermissible burden on interstate commerce under the test set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (Pet. App. 14a-16a).

The Ninth Circuit reversed, and, in doing so, professed to avoid the constitutional issue (Pet. App. 2a-7a). The court found "implicit approval of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands" (Pet. App. 2a). The express consent of Congress was held not to be a prerequisite for the validation of otherwise impermissible state commercial regulations (Pet. App. 5a):

The rule acknowledging congressional power to approve otherwise impermissible state regulation of interstate commerce usually is applied in cases where Congress has expressly authorized such regulation, *see, e.g., Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981). But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests.

ARGUMENT

The court of appeals, in light of its finding that "Congress has acted to validate the state policy" (Pet. App. 5a), did not review either the applicability of the *Alexandria Scrap* exemption or the district

Scrap exemption" (Pet. App. 14a), noting that "[h]ere the State is restricting the flow of a state-owned nature resource rather than a state-owned man-made commodity" (Pet. App. 13a).

court's conclusion that the primary manufacture requirement constitutes an unconstitutional burden on commerce under the test set forth in *Pike v. Bruce Church, Inc.*, *supra*. We likewise do not address these questions here, since this Court may deem it appropriate to remand the case to the court below for its consideration of the constitutional issues. But we join petitioner in urging the Court to review and reverse the holding that Congress has implicitly authorized Alaska's in-state processing requirement.

1. The court of appeals' holding (Pet. App. 5a) that express congressional authorization "is not always necessary" in order to validate an otherwise impermissible state regulation of interstate commerce conflicts with a consistent line of decisions of this Court. When Congress has exercised its "undoubted power to redefine the distribution of power over interstate commerce" (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945)), it has always done so expressly. See, e.g., *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 654 (1981) (Congress "explicitly intended" the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, to authorize state taxing and regulatory powers over the insurance business); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 427 (1946) (state tax on foreign insurance companies upheld in view of "positive expression" in the McCarran Act); and *Whitfield v. Ohio*, 297 U.S. 431, 438-439 (1936) (Hawes-Cooper Act, 49 U.S.C. 60, expressly removed restrictions on state regulatory power over convict-made goods shipped in original packages in interstate commerce). Most recently, in *White v. Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), the Court upheld a "local hire"

executive order issued by the Mayor of Boston, Massachusetts, insofar as it was applied to projects supported in part with funds from federal programs, only because it was found to be "*affirmatively sanctioned*" by the pertinent regulations of those programs," and thus exempt from the restraints of the Commerce Clause. *White, supra*, slip op. 11 (emphasis added).

The requirement that Congress expressly consent to otherwise unconstitutional state restraints on interstate commerce is confirmed by recent decisions invalidating state laws when congressional authorization was lacking. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court rejected the contention that a Florida law prohibiting out-of-state bank holding companies from acquiring local investment subsidiaries was authorized by Sections 3(d) and 7 of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(d), 1846, finding "nothing in [the Act's] language or legislative history to support the contention * * *." 447 U.S. at 49. In *Sporhase v. Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), Congress was found not to have consented, in various federal statutes which defer to state water law, to a Nebraska statute restricting the export of groundwater from the state.⁴ Finally, in *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982), the Court declined to read Section 201(b) of the Federal Power Act, 16 U.S.C. (Supp. V) 824(b), as giving congressional consent to a New Hampshire statute prohibiting the exportation of

⁴ This Court noted that in each prior instance where congressional consent was found in a federal statute, it was "expressly stated." Slip op. 18.

hydroelectric energy produced within its borders by a federally licensed facility:

[W]hen Congress has not "expressly stated its intent and policy" to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress "probably had in mind." See *United States v. Public Utilities Comm'n of California*, 345 U.S., at 319 (Jackson, J., concurring); see also *id.*, at 311.

The unprecedented "implicit approval" theory of the court of appeals directly conflicts with the holding in *New England Power Co.* set forth above. This approach invites the courts to resort to "mere speculation" in order to determine whether Congress, in enacting a statute regulating commerce, tacitly authorized states to impose parallel and otherwise impermissible burdens on interstate commerce. The uncertainties inherent in the application of the "implicit approval" theory are illustrated in the case at hand. First, determining when a "parallel policy" exists is far more difficult than the court of appeals' opinion indicates. Any number of federal laws could be interpreted as establishing a "policy" on a particular matter and the inferences to be drawn might well be inconsistent. For instance, although the court relied on statutes regulating the shipment of timber from federal lands (693 F.2d at 893; Pet. App. 5a-7a), it failed to mention the only congressional statute dealing with timber shipped from state lands, which is what is at issue in this case. This latter statute restricted the export of unprocessed red cedar only, and excepts from even this limited restriction the

State of Alaska. See 50 U.S.C. App. (Supp. V) 2406(i)(1); Act of Nov. 27, 1979, Pub. L. No. 96-126, Section 308, 93 Stat. 980 (1979). Thus, it can be inferred that Congress *favours* the unrestricted export of all timbers except red cedars from state lands and *disapproves* any restrictions on timber export from the State of Alaska.

Second, even assuming *arguendo* that we should examine the statute regulating exports from federal lands for the relevant policy, it is not at all clear that the federal policy, taken alone, can support the Alaskan statute. The objective of the federal timber policy for national forest lands, as set forth in the Organic Administration Act of 1897, 16 U.S.C. 475 (Pet. App. 22a), is to secure "favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." The purpose of the Alaskan statute, however, is to protect in-state manufacturers as well as to secure a continuous supply. See Excerpt of Record in Court of Appeals at 73. It may well be that the federal lands restriction fully satisfies the congressional concern to assure a continuous supply of timber for the United States, while the state statute continues to operate in pursuit of a protectionist aim that Congress did not endorse. This illustrates the difficulty courts will have in ascertaining whether an ostensibly "parallel" state statute is pursuing independent policy goals under the cloak of a federal statute whose policy goals have already been fulfilled.

What is more, the requirement of express congressional consent to otherwise invalid state laws is not grounded solely on a desire to avoid judicial speculation. It also implements the constitutional alloca-

tion of power over the regulation of commerce. From the earliest days of the Republic, this Court saw the danger to the Nation's economy if state legislatures, in which local interests alone were represented, were free to pass statutes that discriminated against interstate commerce. See *McCulloch v. Maryland*, 17 U.S. [4 Wheat.] 316 (1819). Later, the Court extended this reasoning and struck down under the Commerce Clause statutes that discriminated against unrepresented out-of-state interests. See *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 499 (1887). See also *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940). The requirement of explicit congressional approval for discriminating state statutes is a necessary corollary to the proposition that the Commerce Clause is designed to protect unrepresented interests from parochial discrimination. See, generally, J. Ely, *Democracy and Distrust* 83-84 (1980). It assures that the national legislative process will afford the representatives of the burdened interests a clear opportunity to voice their views. Cf. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 HARV. L. REV. 682, 695 (1976). The "implicit approval" theory on the other hand strips away this opportunity from the national representatives of the burdened interests and gives the initiative instead to state legislatures. The net effect of the theory is therefore to make it harder to check "the tendencies toward Economic Balkanization" (*Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)), which the Commerce Clause is designed to prevent.

2. The decision of the court of appeals is of substantial importance to the timber industry and, more-

over, implicates the commercial relations of the United States with other nations. In addition to Alaska, three other states within the Ninth Circuit—California, Oregon, and Idaho—restrict the export of unprocessed timber.⁵ Because most of the timber exported from these states is purchased by Japan,⁶ the primary impact of these state statutes falls on foreign commerce. Foreign purchasers of American state-owned timber must thus abide by different regulations depending upon where the timber is located. The result is state interference with foreign commerce, which is, of course, “preeminently a matter of national concern.” *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

It is evident that the “implicit approval” theory, if accepted, would have a far-reaching effect on the federal government’s power over foreign commerce. Under the theory of implied congressional consent, states would be free to enact non-uniform and otherwise impermissible state burdens on interstate and foreign commerce without any focused consideration and decision by the national legislature. In our view, that doctrine carries too great a risk that the foreign relations of the United States will be adversely affected by an unintended re-allocation of the

⁵ See Pet. 14 and Pet. App. 36a-38a.

⁶ As noted by petitioner (Pet. 3 n.2), Japan, in 1980, purchased 90% of the \$1.4 billion of unprocessed logs exported from Washington, Oregon, Alaska and California. F. Ruderman, *Production, Prices, Employment and Trade in Northwest Forest Industries, Second Quarter 1982* at 19 (U.S. Forest Service 1982). The State of Washington, which does not have an in-state processing statute, received \$1.034 billion of the \$1.4 billion total. Ruderman, *supra*, at 17-19.

commerce power that the Constitution placed in the keeping of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the United States Court of Appeals for the Ninth Circuit should be vacated, and the case should be remanded for further proceedings to resolve the Commerce Clause issues which were not addressed by the court of appeals.

Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

v.

**ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, et al.,**
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Can a state, without the express consent of Congress, prohibit private parties from exporting into interstate and foreign commerce unprocessed logs obtained from state-owned lands, when both the stated purpose and the effect of the prohibition are to favor local manufacturing interests?

2. Can Congressional consent to an otherwise unconstitutional state restraint on interstate and foreign commerce be implied from federal statutes or administrative rules solely regulating activities on federally-owned lands?

PARTIES INVOLVED

South-Central Timber Development, Inc., has one subsidiary, South-Central Export Sales Co., and no affiliates. When this suit was originally filed, South-Central was a wholly-owned subsidiary of Iwakura-Gumi Lumber Co., Ltd., a Japanese corporation. On or about February 17, 1983, Far North Supply Corporation, a Washington corporation, purchased all the shares of South-Central, and now operates South-Central as a wholly-owned subsidiary. Far North Supply Corporation has no other affiliates or subsidiaries.

Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska, Geoffrey Haynes, Director of the Division of Lands of the Department of Natural Resources, and Theodore G. Smith, Director of Forest, Land and Water Management, of the Department of Natural Resources, were appellants below and defendants in the district court. These individuals no longer hold the positions responsible for implementing the state policy being challenged. Moreover, Alaska has reorganized the relevant departments. As a result, respondents now are: Esther Wunnicke, Commissioner of the Department of Natural Resources; Thomas J. Hawkins, Director of the Division of Land and Water Management; and John L. Sturgeon, State Forester. Respondent, Kenai Lumber Company, Inc., a subsidiary of Louisiana Pacific Corporation, which operates a processing mill in the vicinity and was a competing bidder on the Icy Cape No. 2 sale, was an appellant below and an intervenor-defendant in the district court.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 693 F.2d 890, and is set forth in the Joint Appendix ("J.A.") at 138a-44a. The memorandum and order of the United States District Court for the District of Alaska is reported at 511 F. Supp. 139, and appears at J.A. 127a-35a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 1, 1982. (J.A. at 145a). On February 17, 1983, Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and

including March 30, 1983. The Petition for Certiorari was filed on March 30, 1983, and was granted on October 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

This case involves the following constitutional provision, statutes, and regulations: the Commerce Clause of U.S. Const. art. I, § 8, cl. 3; Alaska Stat. § 38.05.115 (1977); Alaska Admin. Code tit. 11, § 76.130 (1974) (repealed 1982); Alaska Admin. Code tit. 11, § 71.230 (1982); and Alaska Admin. Code tit. 11, § 71.910(11) (1982). These provisions are set forth in the Appendix to the Petition for Certiorari ("Pet. App.") at 19a-21a.

STATEMENT

A. Facts

This case involves an attempt by Alaska to require that timber cut from state-owned lands be processed in-state prior to being exported into foreign or interstate commerce. In September, 1980, Alaska's Commissioner of the Department of Natural Resources published a notice of sale for approximately 49,000,000 board feet of timber in the area of Icy Cape, Alaska. (J.A. at 34a). The notice of sale, the prospectus, and the proposed contract for the Icy Cape No. 2 sale all imposed a primary manufacture requirement, i.e., the timber would have to be processed in-state prior to being exported into either interstate or foreign commerce.¹ In other words, Alaska sought to impose a complete ban on the export of unprocessed logs from the area covered by the sale.

¹The notice of the Icy Cape No. 2 timber sale provided that "[p]rimary manufacture within the State of Alaska will be required as a special provision of the contract." (J.A. at 35a). The prospectus provided that "primary manufacture shall be as defined under Alaska Admin. Code Title 11, § 76.130 of the Timber Sales Regulations' and as further defined in the Governor's Policy Statement on Primary Manufacture' dated May 7, 1974." (R. at Tab 4). The timber sale

The Commissioner's action was taken pursuant to state regulations in effect at the time, *see* Alaska Admin. Code tit. 11, § 76.130 (1974) (repealed 1982) (J.A. at 20a-21a),² and in response to resolutions of the state legislature requesting him to exercise his statutory authority³ to impose the primary

contract, which the successful bidder on the Icy Cape No. 2 timber sale would have been required to sign, provided as follows:

Section 68. Primary Manufacture. Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974.

For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips are considered to have received primary manufacture.

The primary manufacture regulation, Alaska Admin. Code tit. 11, § 76.130 referenced above is set out in Pet. App. at 20a; the Governor's Policy Statement on Primary Manufacture referenced above is set out in J.A. at 33a.

² Although the original primary manufacture regulation has been repealed, it has been replaced by two other provisions which continue and to some extent even strengthen Alaska's policy. *See* Alaska Admin. Code tit. 11, § 71.230 (1982) and Alaska Admin. Code tit. 11, § 71.910(11) (1982) (Pet. App. at 19a-20a). Moreover, as respondents have noted, while the Commissioner had discretion under the regulation to decide whether or not to require primary manufacture for any given sale, the state "usually" requires purchasers of state-owned timber to have primary manufacture performed within the state. (Def. Br. (Ct. App.) at 6.)

³ The Commissioner's statutory authority is defined in Alaska Stat. § 38.05.115, which states that the Commissioner "upon recommendation of the director, shall determine the timber and other materials to be sold, the limitations, conditions and terms of sale." (Pet. App. at 19a).

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manufacture requirement in order "to provide local employment as well as building materials for the Alaska market." (J.A. at 53a).⁴ There is no dispute about the underlying purpose of the primary manufacture requirement: as the state itself concedes, the primary manufacture requirement reflects a longstanding policy of the State of Alaska to protect and promote its own timber processing industry. (R. at Tab 45, at 3).⁵

Petitioner, South-Central Timber Development, Inc., ("South-Central"), an Alaska corporation, is primarily engaged in the business of purchasing Alaska standing timber,⁶ logging such timber, and shipping the resulting logs into for-

⁴ We have been advised that Alaska on November 17, 1983, sold the Icy Cape No. 2 timber *without* a primary manufacture requirement. This, however, does not render this case moot for it is well-established that "mere voluntary cessation of allegedly illegal conduct, or a statement by the defendant that it would be uneconomical to engage in any further questioned behavior, does not render moot a suit for an injunction if it is possible for the defendant to resume such conduct." R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978), at 891, and cases cited therein. Here the district court entered a permanent injunction against enforcement of Alaska's primary manufacture requirement; Alaska has not abandoned that policy and is free to resume requiring primary manufacture at any time.

⁵ See also Final Finding for Icy Bay/Cape Yakataga sale (J.A. at 40a) ("[p]rimary manufacture will be required when necessary to assure a continuing supply of timber for existing industry.") As the Ninth Circuit noted, "The Commissioner stated the requirement was necessary [on the Icy Cape No. 2 sale] to insure 'a continuing supply of timber for existing industry' during temporary shortages of timber from federal lands." (693 F.2d at 892; J.A. at 140a-41a).

⁶ "Timber" means trees in their natural condition and location, live or dead from natural causes; "logs" means portions of trees cut into lengths, with limbs removed, transported off the land where they grew and ready for manufacture into lumber, plywood, paper or other usable products; "cants" are portions of logs which have been cut lengthwise and thus are flat on at least one side, but which will

eign commerce, almost exclusively to Japan. (J.A. at 5a). At the time of the proposed sale, South-Central was logging timber in the same general area under an earlier state timber sale (known as "Icy Cape No. 1"), which did not require local processing, and exporting most of the logs to Japan. (J.A. at 8a). Because South-Central no longer had a working mill in the vicinity when the Icy Cape No. 2 sale was publicized, it would have been unable to meet the local processing requirement itself (J.A. at 8a), and it would have been uneconomical to contract the processing out to an in-state processor. Thus, because of the additional costs of having the primary manufacture performed in-state, petitioner was effectively precluded from bidding on the timber. (511 F. Supp. at 141; J.A. at 129a).

The public auction for the Icy Cape No. 2 sale was scheduled to be held on October 23, 1980. (J.A. at 34a). On October 16, 1980, South-Central, after having previously objected to the state on constitutional grounds about the primary manufacture requirement (J.A. at 27a), filed a Complaint for Injunctive Relief in the United States District Court for the District of Alaska. In the complaint, South-Central alleged that Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska, and others,⁷ were preparing to hold the sale; that the primary manufacture requirement contained in the public notice and state contract for that sale was repugnant to the Commerce Clause of the United States Constitution (U.S. Const. art. I, § 8, cl. 3); and that it would suffer irreparable harm if the sale were not enjoined.

have to be cut lengthwise again to produce lumber suitable for end use. Under the Alaska regulation in effect at the time of the proposed sale, primary manufacture could be accomplished by processing logs into cants or chips.

⁷ Robert LeResche and the other individual defendants in the proceedings below no longer hold the offices in question. See p. ii for a current listing of the individual respondents.

B. Proceedings Below

1. District Court Decision

On January 5, 1981, the United States District Court for the District of Alaska issued a Memorandum and Order granting the Petitioner's Motion for Summary Judgment and a Permanent Injunction. The Court enjoined the Icy Cape No. 2 sale on the ground that the primary manufacture regulation violated the Commerce Clause of the Constitution (U.S. Const. art. I, § 8, cl. 3). (511 F. Supp. at 140, 144; J.A. at 128a-29a, 135a). The Judgment, which granted a Permanent Injunction prohibiting the defendants from requiring primary manufacture under the state regulations, was entered by the district court on January 6, 1981. (J.A. at 136a).

The district court rejected respondents' argument that the primary manufacture requirement did not violate the Commerce Clause because the state's policy was consistent with federal policy as to federal lands. After examining federal statutes and regulations restricting the export of unprocessed logs from *federal* lands, the court concluded:

Congress has not consented to any primary manufacture requirements imposed *by the states*. . . .

Although Congress has authorized the Secretary of Agriculture to make necessary rules to regulate the national forests, and has imposed export quotas on unprocessed timber from *federal* lands, *it has in no way expressly exempted state timber laws from commerce clause restrictions*.

(511 F. Supp. at 141-42; J.A. at 131a)(emphasis added).

The district court also rejected Alaska's argument that the challenged action was exempt from Commerce Clause scrutiny because it was acting in a proprietary capacity. The court, rejecting Alaska's reliance on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), noted that here, unlike the situation in *Alexandria Scrap*, "the State is restricting the flow of a state-owned natural resource rather than a state-owned man-made commodity,"

and that, unlike man-made commodities, "[t]imber is not . . . capable of being readily produced by any State at any time." (511 F. Supp. at 142; J.A. at 132a-33a). Consequently, concluded the court, "[t]he uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow, prevent a state from economically discriminating in favor of its residents simply because a resource lies on state-owned land." (511 F. Supp. at 142-43; J.A. at 133a). Moreover, said the court, "[w]hile the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not 'attach conditions to the use or disposition of the resource that might independently burden interstate commerce. . . .'" (511 F. Supp. at 143; J.A. at 133a) (quoting *Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 79 (1980)).

On the merits of the Commerce Clause issue, the court, applying the *Pike* test (*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)), held that the primary manufacture requirement was unconstitutional. The court found that the in-state processing requirement did not regulate even-handedly,⁸ that it constituted simple economic protectionism, and that it placed a substantial burden on commerce. (511 F. Supp. at 143; J.A. at 134a). The court also concluded that Alaska had less burdensome means available to it to achieve the same end. (511 F. Supp. at 143-44; J.A. at 134a-35a).

⁸The court reasoned that the requirement did not regulate even-handedly since it did not fall evenly on companies with in-state timber processing mills and companies with out-of-state timber processing mills, and that the requirement precluded South-Central from competing on an equal footing with companies that possess in-state mills capable of performing primary manufacture. (511 F. Supp. at 143; J.A. at 134a-35a).

2. Court of Appeals Decision

On appeal, the United States Court of Appeals for the Ninth Circuit reversed. (693 F.2d at 890-93; J.A. at 138a-44a). The court noted that the Commerce Clause, by its own power, invalidates state statutes that discriminate against or unduly burden interstate commerce; that in the absence of Congressional authorization, "state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case," and that the "rule has been invoked to invalidate state statutes which promote local processing industries by forbidding shipment of raw resources"—which is precisely the case here. (693 F.2d at 892; J.A. at 141a).

The court of appeals also recognized that this Court has carved out a narrow exception to this general rule for situations in which a state acts as a "market participant" rather than a "market regulator." It concluded, however, that it did not have to resolve the market participant issue since "[t]his [was] not a case where the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy." (693 F.2d at 892; J.A. at 142a).

On the Congressional authorization issue, the Ninth Circuit recognized "[t]he rule acknowledging congressional power to approve otherwise impermissible state regulation of interstate commerce"—saying it "usually is applied in cases where Congress has expressly authorized such regulation." (693 F.2d at 893; J.A. at 142a). The court then stated, *without citing any authority*, that "such express authorization is not always necessary." (693 F.2d at 893; J.A. at 142a). The court's support for its novel "implicit approval" theory was stated in a single sentence: "[t]here will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy *without explicit congressional approval*, even if the purpose and effect of the state law is to favor local interests." (693 F.2d at 893; J.A. at 142a)(emphasis added).

The Ninth Circuit then found that "there is *implicit approval* of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands." (693 F.2d at 891; J.A. at 139a) (emphasis added). In particular, the court found that the federal policy with respect to timber cut from federal lands "evinced a general federal policy of promoting geographic dispersion in the timber industry" (693 F.2d at 893; J.A. at 143a), and that Alaska's policy served the same objective as the federal policy, i.e., "that of promoting industrial developments in isolated areas." (693 F.2d at 893; J.A. at 143a). Because, according to the court, "[t]he state's decision could not have been more in keeping with federal timber policy," there was "ample congressional acquiescence in Alaska's primary manufacture requirement." (693 F.2d at 893; J.A. at 144a).


SUMMARY OF ARGUMENT

1. Alaska's primary manufacture requirement constitutes a clear violation of the Commerce Clause. Even where only interstate commerce is involved, this Court has long held that protectionist state-imposed restrictions reserving natural resources for in-state processors constitute a *per se* violation of the Commerce Clause. This case, moreover, involves a burden on *foreign commerce* where constitutional scrutiny is even more rigorous, and state-imposed restrictions on that commerce are even more suspect. What Alaska has done here by banning the export of unprocessed logs conflicts with both our Nation's export policies and its international trading obligations. It precludes our Nation from being able to speak with "one voice" vis-a-vis one of its major trading partners (Japan), and trespasses on an area over which Congress has "exclusive and absolute" power. This Alaska cannot do consistently with the Commerce Clause.

2. Alaska's protectionist scheme has not been duly authorized by Congress. The unprecedented "implicit approval" theory on which the Ninth Circuit based its decision is in direct conflict with the prior decisions of this Court that have held

that *express* Congressional authorization is required in order to validate an otherwise impermissible state restraint on interstate commerce. Such an "implicit approval" approach allows a court to indulge in "mere speculation as to what Congress probably had in mind," and is especially dangerous where, as here, the relevant legislative history supports an inference as to Congressional intent that is diametrically opposed to what the court below inferred.

3. The market participant doctrine cannot shield Alaska from the requirements of the Commerce Clause. Alaska here is not acting as a market participant but rather as a regulator of downstream conditions in a market—timber processing—in which it is not even engaged. Moreover, here, unlike prior situations in which this Court has applied the market participant doctrine, (i) the article of commerce at issue is not a manufactured good produced at a facility owned by the state, but rather a natural resource which is "by happenstance" located in the state; (ii) the primary economic impact of the state scheme is on out-of-state consumers rather than in-state taxpayers; (iii) the state regulation impacts most directly on foreign commerce rather than interstate commerce; and (iv) the state restraint involves a total ban on the export of a product beyond the state's borders, rather than a subsidy program funded by the state. If the market participant doctrine is applied to these extreme facts, the allocation of power between the federal government and the states under the Commerce Clause will be altered dramatically, and the concern expressed by members of this Court and others as well about the absence of any "limiting principles" to that doctrine will be realized.



ARGUMENT

I. Alaska's Primary Manufacture Requirement Violates The Commerce Clause.

A. A State-Imposed Primary Manufacture Requirement Applied To Natural Resources Is A *Per Se* Violation Of The Commerce Clause.

Alaska's primary manufacture requirement is precisely the type of conduct that this Court has held subject to a rule of virtual *per se* illegality. Here, Alaska has required business operations to be performed in-state that could more efficiently be performed elsewhere. Economic protectionism of this type has consistently been invalidated by this Court. Alaska's attempt to protect its wood processing industry should meet the same fate.

This Court has long recognized that the battle over the control and exploitation of this Nation's natural resources presents fundamental Commerce Clause concerns. *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). It has emphasized that the power of local political units to reserve natural resources found within their borders for the benefit of their own inhabitants carries a serious potential for the division of the Nation along local or regional lines.⁹

If the States have [the power to confine natural resources found within their borders to their inhabitants] a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may

⁹ Others have made the same point. *See generally The Second War between the States*, Bus. Wk., May 17, 1976, at 92-114; *Balkanizing Canada: The Cost of Provincial Barriers*, Bus. Wk., Sept. 15, 1980, at 52.

be retaliated by embargo, and commerce will be halted at state lines.

Pennsylvania v. West Virginia, 262 U.S. at 599.

The erection of trade barriers at state lines threatens the policy of the Commerce Clause to prevent states from isolating themselves from the national economic unit.¹⁰ As Justice Cardozo said in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935): "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."¹¹

Accordingly, in Commerce Clause cases, this

Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1; *Johnson v. Haydel*, 278 U.S. 16; *Toomer v. Witsell*, 334 U.S. 385.

Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).¹² Because such restraints "impose an artificial rigidity on the economic

¹⁰ As Justice Jackson stated:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949).

¹¹ See also *The Federalist* No. 22 (A. Hamilton).

¹² In discussing *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), one commentator has noted: "a requirement that all shrimp caught in state waters be shelled in-state presents the obvious dan-

pattern of the industry," *Toomer v. Witsell*, 334 U.S. 385, 404 (1948), they threaten the animating purpose of the Commerce Clause—the union of a collection of independent, sovereign states into one nation.

Alaska's economic protectionism is precisely the type of action that this Court's Commerce Clause decisions have attempted to forestall.¹³ Alaska's primary manufacture requirement violates a fundamental Commerce Clause value—a "concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

Moreover, Alaska's restraint runs afoul of the basic Commerce Clause concern that those harmed by a governmental act be represented in the political body making the decision. This Court has exercised the "strictest scrutiny" when faced with facially discriminatory legislation, *Sporhase v. Nebraska ex rel. Douglas*, 102 S. Ct. 3456, 3465 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), in part, because out-of-state parties are not represented in the political body enacting the discriminatory legislation. See, e.g., *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177, 184

ger of cartelization by the state's shelling industry." Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563, 615 (1983) (footnote omitted). That danger is likewise present here with respect to Alaska's timber processing industry.

¹³ As one noted commentator has stated: "[W]hen the limits that the federal system imposes upon its components are in question, when the centrifugal, isolating or hostile forces of localism are manifested in state legislation, the interests of union require that these factors be recognized and the judicial negative be imposed." Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 220 (1957).

n.2 (1938); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940); see also Tushnet, *Rethinking The Dormant Commerce Clause*, 1979 Wis. L. Rev. 125, 128 n.14. Here, the principal burden of the primary manufacture requirement falls on those located outside the state, and its only purpose is to protect in-state manufacturing interests. Alaska's requirement cannot, therefore, survive this Court's rule of virtual *per se* illegality.

B. The State Restriction Here Directly Burdens Foreign Commerce And Thus Impermissibly Interferes With A Preeminently Federal Function.

The primary impact of Alaska's restraint falls on foreign rather than interstate commerce since most of the timber harvested in Alaska is exported—principally to Japan.¹⁴ South-Central has been effectively prevented from exporting unprocessed logs produced from timber previously owned by the state. Thus, without the express consent of Congress, a state restraint designed solely to protect local manufacturing interests has directly interfered with foreign commerce.

This Court has long construed the Commerce Clause to have granted Congress "exclusive and absolute" power over foreign commerce. *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904). And, "[i]t is an essential attribute of the power that it is

¹⁴ Exports account for well over 90% of the sales of wood products produced from Alaska timber, and virtually all such exports are destined for Japan. See *Shortages and Rising Prices of Softwood Lumber. Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 329 (1973). This is due primarily to the high shipping costs imposed by the Jones Act, 46 U.S.C. § 883 (Supp. V 1981) on traffic between American ports, which makes the transportation of logs to the lower 48 states uneconomical. *Id.* at 306; see *Log-Exporting Problems: Hearings Before the Subcomm. on Retailing, Distribution, and Marketing Practices of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. Pt. 2, 591 (1968).

exclusive and plenary . . . [and that] its exercise may not be limited, qualified or impeded to any extent by state action." *Board of Trustees v. United States*, 289 U.S. 48, 56 (1933). As this Court explained almost one hundred years ago,

Laws which concern the exterior relations of the United States with other Nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties.

Bowman v. Chicago & Northwestern Railway Co., 125 U.S. 465, 482 (1888). See *Zschemig v. Miller*, 389 U.S. 429, 436 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875). See also Note, *Federal Limitations on State "Buy American" Laws*, 21 Colum. J. Transnat'l L. 177, 209 (1982).

Commerce Clause scrutiny is, therefore, more rigorous when a state restraint on foreign commerce is established than when only interstate commerce is involved. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), this Court rejected appellees' argument that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved," 441 U.S. at 446, and held that "[w]hen construing Congress' power to 'regulate Commerce with foreign nations,' a more extensive constitutional inquiry is required." *Id.* This is because

[f]oreign commerce is preeminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. . . ." Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce "with foreign Nations" and "among the several States" in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce

power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction. . . . Finally, in discussing the Import-Export Clause, this Court, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

441 U.S. 434, 448-49 (footnotes omitted; citations omitted). Thus, at the very least, "[i]f state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce." L. Tribe, *American Constitutional Law* § 6-20, at 370 (1978).

Here, there can be no doubt that a log export ban involves commercial relations with foreign nations and that it affects national concerns to a "significant degree." This Nation's log export policy is a controversial issue that has been repeatedly considered by Congress during the past fifteen years, and the international implications of that policy have been examined at length.¹⁵ Involving, as it does, serious questions about our

¹⁵ See *Log-Exporting Problems: Hearings Before the Subcomm. on Retailing, Distribution, and Marketing Practices of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. Pts. 1, 2, 3, 4 (1968) [hereinafter 1968 Hearings]; *Export Control Policy: Hearing Before the Subcomm. on Foreign Agricultural Policy of the Senate Comm. on Agriculture and Forestry*, 93d Cong., 1st Sess. (1973); *Log Export Restrictions: Hearing on S. 1033 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. Pts. 1, 2 (1973); *Shortages and Rising Prices of Softwood Lumber: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. (1973); *Public Timber Export Control: Hearings on H.R. 5544 and H.R. 6820 Before the Subcomm. on Public Lands of the House Comm. on*

"longstanding policy of not imposing unnecessary barriers to international trade," our desire to further "the development of amicable relations with Japan," our desire to improve our balance of payments condition, our concern about possible Japanese retaliation, and our worries about increased reliance by Japan on the U.S.S.R. for its log supplies, any restriction on log exports is clearly a matter of intrinsic national and international importance.¹⁸

As this Court explicitly recognized in *Japan Line*, the United States must be able to speak with "one voice" in matters involving commercial relationships with foreign nations. Indeed, so essential is it to safeguard our Nation's continued ability to speak with "one voice" in foreign affairs that this Court has not hesitated to invalidate state statutes involving this nation's relationships with foreign countries even though they have not actually interfered with the conduct of this Nation's foreign policy, see *Zschemig v. Miller*, 389 U.S. 429 (1968), and even though they may be wholly consistent with and complement federal law, see *Hines v. Davidowitz*, 312 U.S. 52 (1941). Thus, although it may be permissible to uphold against Commerce Clause attack a state statute such as that in

Interior and Insular Affairs, 94th Cong., 1st Sess. (1975) [hereinafter 1975 Hearings]; *United States Trade With Japan, Public Lands Timber Export Bill (H.R. 7972): Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 2d Sess. (1978) [hereinafter 1978 Hearings]; *Resources Planning Act Assessment and Domestic Timber Supply Act: Hearings on H.R. 7255 Before the Subcomm. on Forests of the House Comm. on Agriculture*, 96th Cong., 2d Sess. (1980); *Prohibit Export of Unprocessed Timber: Hearing on H.R. 639 Before the Subcomm. on Forests, Family Farms, and Energy of the House Comm. on Agriculture*, 97th Cong., 1st Sess. (1981) [hereinafter 1981 Hearings].

¹⁸ 1968 Hearings Pt. 3, at 1189; see, e.g., *id.* at 926, 1019, 1137-39, 1144, 1149-50, 1190, 1198-99, 1381-88; 1968 Hearings Pt. 1, at 269-70, 374-78. See also Hanke, *Trade Agenda for the Japan Trip*, Wall St. J., Nov. 4, 1983, at 34, col. 4.

Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), which "posed no threat at all to the Federal Government's ability to 'speak with one voice' in regulating foreign trade," *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 456 n.20, it is not permissible to do so where there is such a threat.

Such a threat is clearly present here. First, Alaska's action conflicts with the national export policy established by Congress. Congress has expressly prohibited states, federal agencies, and private persons from engaging in "standards-related activity that creates unnecessary obstacles to the foreign commerce of the United States." 19 U.S.C. §§ 2532, 2533 (Supp. V 1981).¹⁷ It also has explicitly recognized that export restrictions have potentially serious implications for international relations; that "the ability of United States citizens to engage in international commerce is a fundamental concern of United States policy," and that "[u]ncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States." Export Administration Act of 1979, 50 U.S.C. app. § 2401(1), (2) and (6) (Supp. III 1979). As Congress has provided, "[i]t is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations" Export Administration Act of 1979, 50 U.S.C. app. § 2402(1) (Supp. III 1979).

In accord with these overriding principles, Congressionally-imposed export restrictions are generally limited to situations where export controls are deemed necessary to serve national security purposes (50 U.S.C. app. § 2404), to further foreign policy objectives (50 U.S.C. app. § 2405), or to retain for domestic use commodities determined to be in short supply. (50 U.S.C. app. § 2406). Consequently, Congress has been

¹⁷ "Standard" is defined to include "(A) The specification of the characteristics of a product, including [its] . . . dimensions." 19 U.S.C. § 2571(13).

very specific in stating when it wants export controls to be imposed. One example of this is found in the controls imposed on Alaska North Slope crude oil, which cannot be exported to foreign countries subject to some very limited exceptions. *See* Trans-Alaska Pipeline Authorization Act, 30 U.S.C. § 185(u) (1976); Export Administration Act of 1979, 50 U.S.C. app. § 2406(d)(Supp. III 1979).

In contrast, Congress has authorized a general export ban on unprocessed logs from *federal* lands only (*see* discussion, *infra*, at 28-31). The only federal statute regulating exports of timber from *state* lands bans the export of only one specific type of lumber—unprocessed Western red cedar—and Alaska is expressly exempted from even that limited ban. Export Administration Act of 1979, § 7(i), 50 U.S.C. app. § 2406(i); *see* 15 C.F.R. § 377.7 (1983). Thus, if any inference at all is to be drawn as to the intent of Congress, it is not the inference the Ninth Circuit drew, but rather the opposite: if Congress had intended export controls to be applied to timber from *state*-owned lands as well as federal lands, it would have said so.¹⁸ It did not do so. It has, on the contrary, expressed its general policy objectives to “minimize uncertainties in export control policy;” “to encourage trade with all countries with which the United States has diplomatic or trading relations;” and to “minimiz[e] restrictions on exports of agricultural commodities and products.” *See* 50 U.S.C. app. §§ 2401(9), 2402(1)(Supp. III 1979). The export restriction imposed by Alaska contravenes all of these objectives and frustrates the federal government’s ability to speak with “one voice” vis-a-vis a particularly sensitive trading partner, Japan. *See generally* Hanke, *Trade Agenda for the Japan Trip*, Wall St. J., Nov. 4, 1983, at 34, col. 4.

¹⁸ *See Bowman v. Chicago & Northwestern Railway Co.*, 125 U.S. 465, 482 (1888) (“It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States”).

Second, Alaska's restraint on foreign trade conflicts with the free trade principles set forth in the General Agreement on Tariffs and Trade ("GATT"), to which both the United States and Japan are parties. *See, e.g., 1968 Hearings Pt. 3*, at 1383 (to curtail log exports would conflict with GATT free trade policy). For example, Article XI of GATT states that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A32, T.I.A.S. No. 1700, 55-61 U.N.T.S. There can be little question here that Alaska has imposed "restrictions other than duties, taxes or other charges . . . on the exportation or sale for export of any product destined for the territory of any other contracting party" (*i.e.*, Japan). While Congress can, under accepted principles of international law, itself abrogate its treaty commitments by subsequently enacting inconsistent federal legislation, *see, e.g., Cook v. United States*, 288 U.S. 102, 120 (1933), it is quite another matter for a state such as Alaska to take it upon itself to cause the United States effectively to violate its international trading obligations. *Cf. Missouri v. Holland*, 252 U.S. 416 (1920); *Hines v. Davidowitz*, 312 U.S. 52, 63-65 (1941).¹⁹

¹⁹ Indeed, Article XXIV, paragraph 6, of GATT provides that

[e]ach contracting party shall take such reasonable measures as may be available to it to assure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

61 Stat. A67-68. Thus, GATT does apply to state laws, and this is as it should be for

[l]ocal laws can be just as disruptive of international trade as federal laws and local parochialism leading to protectionist efforts to prefer local products can be as damaging to the pur-

Finally, the situation here, as in *Japan Line*, is especially significant since it is not only the action of Alaska that is ultimately at issue.²⁰ In addition to Alaska, the States of California, Idaho and Oregon impose primary manufacture requirements which prohibit to differing degrees the export into foreign commerce of unprocessed logs from state-owned lands. See Cal. Pub. Res. Code § 4650.1 (West Supp. 1982); Idaho Code § 58-403 (1976); Or. Rev. Stat. § 526.805 (1981).²¹ All of these statutes contain different definitions of primary manufacture, provide different exceptions, and impose different procedural requirements for invoking such exceptions. See generally G. Lindell, *Log Export Restrictions of the Western States and British Columbia* (U.S. Dept. of Agriculture 1978) (J.A. at 93a-119a). Other western states impose no primary manufacture requirement, and freely allow the foreign export of unprocessed logs from state-owned lands. *Id.* Thus, a foreign country wishing to import unprocessed logs from state-owned lands is faced with a bewildering variety of state-imposed rules. As in *Japan Line*, "this . . . obviously . . . make[s] 'speaking with one voice' impossible." 441 U.S. at 453.

In this case, the Ninth Circuit completely ignored the foreign commerce aspect of Alaska's primary manufacture

poses of GATT as federal actions. As tariffs decline local actions can become a major nontariff barrier to trade and it is necessary that nations agree together to prevent these, just as they agree on other barriers.

Jackson, *World Trade and the Law of GATT* (1969), at 116 (footnote omitted). See also *id.*, at 111 ("The conclusion of the American courts has been that GATT does apply to state (or territorial) law.").

²⁰ As this Court noted in *Japan Line*,

[i]f other States follow California's example (Oregon has already done so), foreign-owned containers will be subject to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously would make "speaking with one voice" impossible.

441 U.S. at 453 (footnote omitted).

²¹ These statutes are set out in Pet. App. at 36a-38a.

requirement, and the foregoing precepts established by this Court. In so doing, it reached an unwarranted decision about the permissibility of Alaska's ban on the foreign export of unprocessed logs under the Commerce Clause. It allowed Alaska to take over the sensitive Congressional function of balancing national and international interests, and to impose a selfish burden on foreign commerce with one of this Nation's major trading partners. This is impermissible. Congress knows how to regulate exports to foreign countries and its regulation is, and should be, exclusive.

II. Congressional Consent To Alaska's Primary Manufacture Requirement Has Not Been Given Expressly; Alaska's Action Is, Therefore, Subject To Traditional Commerce Clause Restraints.

A. Congressional Consent To State Action That Would Otherwise Violate The Commerce Clause Must Be Stated Expressly.

"Congress has undoubted power to redefine the distribution of power over interstate commerce . . ." by consenting to state action that would otherwise violate the Commerce Clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). However, this Court has emphasized that it has only

found such consent, [when] Congress' " 'intent and policy' to sustain state legislation from attack under the Commerce Clause" was " 'expressly stated.' " *New England Power Co. v. Hampshire* . . . (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 . . . (1946)).

Sporhase v. Nebraska ex rel. Douglas, 102 S. Ct. 3456, 3466 (1982)(footnote omitted); see *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

In several cases in which this Court has found express consent, the federal statute involved had been enacted specifically to reallocate the tentative distribution of power made by this

Court. *See, e.g., In re Rahrer*, 140 U.S. 545 (1891);²² *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).²³ Under these circumstances, Congress had expressly made the policy judgment that state laws—"which in its silence might be held invalid as discriminatory," 328 U.S. at 431—were not contrary to the national public interest.

In subsequent years, this Court has continued to require *express* Congressional consent. For example, in *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949), this Court found that, although Congress had given the states wide latitude to regulate the milk industry, there was "no federal approval or

²² In *Rahrer*, this Court upheld the Wilson Act, 27 U.S.C. § 121 (1976), which had been enacted in response to this Court's decision in *Leisy v. Hardin*, 135 U.S. 100 (1890).

²³ In 1944, this Court held that the business of insurance was "commerce" subject to the Sherman Act. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Congress responded by enacting the McCarran-Ferguson Act of 1945, which stated in part: "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (1982). A year later in *Prudential Insurance Co. v. Benjamin*, the Court rejected a Commerce Clause challenge to a South Carolina tax that allegedly discriminated against out-of-state insurance companies. The Court held that the McCarran-Ferguson Act had given express approval to the state activity challenged. Congress had "expressly stated its intent and policy," 328 U.S. at 427, to allow the states to regulate and tax the business of insurance free from dormant Commerce Clause constraints. Although it assumed that the tax was discriminatory, 328 U.S. at 429, this Court rejected the Commerce Clause challenge. *See Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 654 (1981) (Congress "explicitly intended" the McCarran-Ferguson Act, 15 U.S.C. § 1011, to authorize state taxing and regulatory powers over the insurance business).

responsibility for the challenged features of [the] order [in question]. . . ." 336 U.S. at 542.²⁴ Justice Jackson explained:

We have no doubt that Congress in the national interest could prohibit or curtail shipments of milk in interstate commerce, unless and until local demands are met. Nor do we know of any reason why Congress may not, if it deems it in the national interest, authorize the states to place similar restraints on movement of articles of commerce. And the provisions looking to state cooperation may be sufficient to warrant the state in imposing regulations approved by the federal authorities, even if they otherwise might run counter to the decisions that coincidence is as fatal as conflict when Congress acts. . . . *It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.*

H. P. Hood & Sons, 336 U.S. at 542-43 (citation omitted; emphasis added).

This Court has reaffirmed the requirement that consent be stated expressly in three recent cases. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), rejected the contention that the Federal Power Act authorized New Hampshire to prohibit the exportation of hydroelectric power produced within its borders or otherwise reserve for its own citizens the economic benefit of such hydroelectric power. This Court found no "affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.' " 455 U.S. at 341 (quoting *Southern*

²⁴ The Court's emphasis on federal approval served to distinguish *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the United States Secretary of Agriculture had affirmatively cooperated in promoting the state program and aided it through substantial federal loans. The Court in *Hood* made it clear that such affirmative expressions of federal approval are essential if state actions otherwise inconsistent with the Commerce Clause are to withstand scrutiny. *H. P. Hood & Sons*, 336 U.S. at 537.

Pacific Co. v. Arizona, 325 U.S. at 769). "Nothing in the legislative history or language of the statute evinces a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause,' *United States Public Utilities Comm'n of California*, *supra*, at 304, or to modify the earlier holdings of this Court concerning the limits of state authority to restrain interstate trade." 455 U.S. at 341. This Court concluded: "when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " 455 U.S. at 343 (citations omitted).²⁸

Similarly, *Sporhase v. Nebraska ex rel. Douglas*, 102 S. Ct. 3456 (1982), rejected a contention that Congress had authorized Nebraska to prohibit the exportation of groundwater unless the importing state granted reciprocal rights to withdraw and transport groundwater from that state for use in Nebraska. This Court found that this "reciprocity requirement [did] not survive the 'strictest scrutiny' reserved for facially discriminatory legislation." 102 S. Ct. at 3465 (footnote omitted)(quoting *Hughes v. Oklahoma*, 441 U.S. at 337). This Court recognized that thirty-seven federal statutes and several interstate compacts "demonstrate[d] Congress' deference to state water law," 102 S. Ct. at 3466 (footnote omitted), but found that there was no indication "that Congress wished to remove federal constitutional constraints on such state laws. . . . In the instances in which we have found . . . consent [to state restraints on commerce], Congress' "intent and poli-

²⁸ In contrast to this Court's approach in *New England Power*, the court below clearly engaged in "mere speculation as to what Congress probably had in mind." See discussion, *infra*, at 27-32. The "implicit approval" approach devised by the court below would introduce an unnecessarily complex and indeterminate inquiry into Commerce Clause litigation, and would encourage more attempts at local protectionism.

cy" to sustain state legislation from attack under the Commerce Clause' was ' "expressly stated." ' " 102 S. Ct. at 3466.

This well-established analysis was followed just last Term in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983). In *White*, this Court rejected a Commerce Clause challenge to an executive order (issued by the Mayor of Boston) "which required that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half *bona fide* residents of Boston." *Id.* at 1043 (footnote omitted). In so doing, this Court reiterated the well-settled principle that "[w]here state or local government action is *specifically authorized* by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *Id.* at 1047 (emphasis added). The Court found appropriate federal authorization there because "the order was *affirmatively sanctioned* by the pertinent [federal] regulations. . . ." *Id.* at 1048 (emphasis added).²⁸

The requirement that Congressional consent be "expressly stated" is central to this Court's Commerce Clause jurisprudence. The allocation of power to regulate commerce between Congress and the states is a serious political matter. Questions of the distribution of power between the federal government and the states, the maintenance of interstate comity, and the protection of free trade and interstate equality in access to natural resources are all centrally involved.

The requirement that Congress expressly state its consent to a state restraint is particularly important in cases—like this one—where the principal burden of the state's action falls on those located outside the state. Such discriminatory acts run afoul of the fundamental Commerce Clause concern that "a legislature representative of the people whose significant in-

²⁸ The federal regulations, set forth at 103 S. Ct. at 1047-48 n.11, "affirmatively permit[ted] the type of parochial favoritism expressed in the order." 103 S. Ct. at 1047 (footnote omitted).

terests are affected . . . [have] made the decision [in question]." O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 Or. L. Rev. 395, 400 (1982). It is permissible for Congress to consent to such discriminatory legislation because those adversely affected are represented in the political body deciding that the discriminatory legislation is in the national interest.²⁷ But it is only when Congressional consent is explicit that we can have any confidence that those adversely affected have had an opportunity to participate in the governmental decision that has done them harm.²⁸ Indeed, this concern is even more important where the discrimination is against foreign countries or nationals since their only political recourse is through the diplomatic process, and foreign diplomats are accredited only to the federal government. *See generally* discussion, *supra*, at 14-22.

B. Congress Has Not Authorized Alaska's Restraint On Interstate And Foreign Commerce.

As both courts below recognized, Congress has not expressly authorized Alaska's primary manufacture requirement or its resulting ban on the export of unprocessed logs (511 F. Supp. at 141; J.A. at 131a; 693 F.2d at 893; J.A. at 142a), and respondents apparently do not contend otherwise. *See* Supp. Resp. Br. at 2.²⁹ Instead, the court below held that Congress had

²⁷ *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1964); Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387, 401 (1983).

²⁸ *See* J. Nowak, R. Rotunda, and J. Young, *Constitutional Law* 268 (2d ed. 1983) ("[T]he dangers of a part discriminating against the whole are greater than the whole discriminating against a part, for an inner political check that is not operative in the former is operative in the latter case").

²⁹ In fact, respondents admit that Congress has been silent on this issue. Supp. Resp. Br. at 5 n.2. Respondents' position is that this

given "implicit approval" to the state's export ban since (said the court) it paralleled federal policy with respect to timber harvested from *federal* lands. As this Court's decisions make plain, this is not an acceptable analytical approach.

Alaska justifies its primary manufacture requirement on the basis of a federal regulation (36 C.F.R. § 223.10(c) (1982)), which governs the export of unprocessed logs from *federal* lands in Alaska. This regulation, in turn, is based on The Organic Administration Act of 1897 (16 U.S.C. §§ 475, 551), which, *inter alia*, authorized the Secretary of Agriculture to sell timber from national forests for use ". . . in the State or territory [of origin], but not for export therefrom." Act of June 4, 1897, 16 U.S.C. § 476, *repealed by* National Forest Management Act of 1976, § 13, 90 Stat. 2958. However, every appropriations act from 1917 to 1926 authorized the Secretary to permit exports from national forests under certain circumstances, (*see, e.g.*, Act of May 11, 1926, 44 Stat. 512), and in 1926 an Act was passed which provided permanent authority to export unprocessed logs from national forests and the Territory of Alaska if "the supply of timber for local use will not be endangered thereby." Act of April 12, 1926, 16 U.S.C. § 616 (1982). Nevertheless, in 1928 the Secretary by regulation prohibited the export of logs from Forest Service lands in Alaska without the Regional Forester's permission, and it is the successor to that regulation (36 C.F.R. § 223.10(c)) that Alaska now relies on to justify its own primary manufacture requirement for logs harvested from its lands.³⁰

Congressional silence should be read as approval of the state's policy. *Id.* This position is flatly inconsistent with this Court's decisions, which have always required that the federal government affirmatively authorize the state restraint in question. *See discussion, supra*, at 22-27.

³⁰ The limitation on log exports from Alaska was established by the then Secretary of Agriculture in instructions which were issued pursuant to Regulation S-2 which provided that "[u]nless prohibited by specific instructions from the Secretary of Agriculture, timber

The next major Congressional initiative occurred in 1968 when Congress enacted Part IV of the Foreign Assistance Act of 1968, known as the Morse Amendment, Pub. L. No. 90-554, § 401, 82 Stat. 966, which instituted a log export quota covering timber from all federal lands west of the 100th meridian, including Alaska. When the Amendment expired on December 31, 1971, it was extended on a temporary basis until 1973 by an amendment to the Housing and Urban Development Act of 1970, Pub. L. No. 91-609, § 921, 84 Stat. 1817. Then in October, 1973, Congress, in a rider to the Department of Interior Appropriations Act (Pub. L. No. 93-120, § 301, 87 Stat. 511 (1973)), instituted a ban on the export of unprocessed timber from federal lands west of the 100th meridian in the contiguous 48 states (*i.e.*, federal lands in Alaska were no longer included within the ban). This ban has been reinstated in each succeeding year in the Department of Interior Appropriations Acts. *See, e.g.*, Pub. L. No. 96-126, § 301, 93 Stat. 979 (1979) (in effect when this action was filed).³¹

lawfully cut on any National Forest may be exported from the State or Territory where grown." In 1946, Regulation S-3 (the successor to Regulation S-2) was amended to incorporate the instructions. The current regulation reads substantially as it did when set forth as instructions to Regulation S-2. *1968 Hearings Pt. 3*, at 1092. *See generally 1968 Hearings Pt. 1*, at 92-94. *See also* 36 C.F.R. § 223.10(i) (1977).

³¹ That rider provided that:

No part of any appropriation under this Act shall be available to the Secretaries of the Interior and Agriculture for use for any sale hereafter made of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States which will be exported from the United States, or which will be used as a substitute for timber from private lands which is exported by the purchaser: Provided that this limitation shall not apply to specific quantities of grades and species of timber which said Secretaries determine are surplus to domestic lumber and plywood manufacturing needs.

In short, Congress has imposed a general export ban only on unprocessed logs from *federal* lands.³² This is not an oversight, but rather a conscious policy decision. Congress has on a number of occasions declined to enact legislation that would have extended export restrictions to include logs from lands other than federally-owned lands. *See, e.g.*, S. 1734, 92d Cong., 1st Sess. (1971); S. 1033, 93d Cong., 1st Sess. (1973); S. 1820, 93d Cong., 1st Sess. (1973); S. 1507, 93d Cong., 1st Sess. (1973); H.R. 8547, 93d Cong., 1st Sess. (1973); H.R. 639, 97th Cong., 1st Sess. (1981); *see* H.R. Rep. No. 93-325, 93d Cong., 1st Sess. (1973); S. Rep. No. 93-198, 93d Cong., 1st Sess. (1973).³³ Indeed, in 1981, Congress was specifically asked to grant "the States authority to pass laws regarding domestic manufacturing. . . ." 1981 *Hearings*, at 18-19.³⁴ Again, it declined to do so. Indeed, the only time Congress has approved export restrictions involving logs from state-owned as well as federally-owned lands was in 1979 when it enacted legislation designed to curb exports of unprocessed western red cedar—and Alaska

³² Even there, Congress has repeatedly declined to close loopholes in existing legislation, or to make that legislation permanent. *See, e.g.*, S. 1775, 93d Cong., 1st Sess. (1973); H.R. 5544 and 6820, 94th Cong., 1st Sess. (1975); H.R. 7972, 95th Cong., 1st Sess. (1977); H.R. 7255, 96th Cong., 2d Sess. (1980); H.R. 639, 97th Cong., 1st Sess. (1981). *See also* 1978 *Hearings*, at 90; 1975 *Hearings*, at 1-8, 11.

³³ *See generally* *Export Control Policy: Hearing Before the Subcomm. on Foreign Agricultural Policy of the Senate Comm. on Agriculture and Forestry*, 93d Cong., 1st Sess. 257-58 (1973); *Shortages and Rising Prices of Softwood Lumber: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 285, 303, 330 (1973); 1978 *Hearings*, at 106; 1981 *Hearings*, at 23, 87, 106-07. *See also* Native Claims Settlement Act, 43 U.S.C. § 1621(k)(1) (1976), which contained a temporary restriction on log exports. This restriction expired in 1976, and has not been reenacted. Thus, unprocessed logs from Native American lands in Alaska are freely exportable.

³⁴ This request was prompted by the district court decision below. 1981 *Hearings*, at 18-19.

is exempt from even that limited restriction. *See* Export Administration Act of 1979, § 7(i), 50 U.S.C. app. § 2406(i); Pub. L. No. 96-126, § 308, 93 Stat. 980 (1979); 15 C.F.R. § 377.7 (1983). *See generally* *Extension and Revision of the Export Administration Act of 1969: Hearings and Mark-Up Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. Pt. 1, 453-461, 705-11 (1979). Thus, the court below could have as readily concluded that Congress had decided *not* to restrict the export of logs from timber on state-owned lands as it did that such a restriction had received Congress' "implicit approval."³⁵

Nor is it at all clear that the federal policy is even consistent with the Alaska regulation. As the Solicitor General noted,

The objective of the federal timber policy for national forest lands, as set forth in the Organic Administration Act of 1897, 16 U.S.C. 475 . . . is to secure "favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." The purpose of the Alaskan statute, however, is to protect in-state manufacturers as well as to secure a continuous supply. . . . It may well be that the federal lands restriction fully satisfies the congressional concern to assure a continuous supply of timber for the United States, while the state statute continues to operate in pursuit of a protectionist aim that Congress did not endorse.

U.S. Br. at 8. Moreover, the federal regulation upon which Alaska relies simply states that the "requirement is necessary to ensure the development and continued existence of ade-

³⁵ Indeed, this conclusion is essentially the same as that reached in a recent staff report published by a Committee of the Oregon legislature that examined the Oregon primary manufacture statute. *See* Oregon Joint Legislative Committee on Trade and Economic Development, *Final Draft, The Log Export Issue: An Analysis*, at 23 (1983); Pet. App. at 62a-83a. *See also* U.S. Br. at 7-8 ("Thus, it can be inferred that Congress favors the unrestricted export of all timbers except red cedars from state lands and *disapproves* any restrictions on timber export from the State of Alaska").

quate wood processing capacity in that State for the sustained utilization of timber *from the National Forests which are geographically isolated from other processing facilities.*" 36 C.F.R. § 223.10(c)(emphasis added). There is in this expression of federal policy with respect to federally-owned lands no indication that the federal government has taken any position on the "promot[ion] of industrial developments in isolated areas" generally (693 F.2d at 893; J.A. at 143a), or that the federal government has taken any position with respect to the processing of timber from *state-owned* lands.

In sum, neither Congress nor the federal government generally has authorized Alaska's primary manufacture requirement.³⁶

III. The Market Participant Doctrine Does Not Immunize Alaska From The Requirements Of The Commerce Clause.

In the proceedings below, respondents relied most heavily on the market participant doctrine to justify Alaska's local processing requirement. Although the market participant issue was not decided by the Ninth Circuit (*see* discussion, *supra*, at 8), respondents have explicitly raised the issue for review by this Court, *see* Resp. Br. at i., 10-14, and this Court's grant of certiorari did not exclude it from consideration.³⁷

³⁶ The court of appeals failed to make any search for a clear expression of federal intent to redefine federal/state power to regulate commerce in this case. It failed to make any search for an indication that the federal government has made the affirmative political choice that Alaska's protectionism "advance[s] the national welfare." *H. P. Hood & Sons*, 336 U.S. at 543. The court's failures are all the more important in the context of foreign commerce. In the absence of a statement to the contrary, the express Congressional policy with respect to exports (*see* discussion, *supra*, at 18-20) should control.

³⁷ Furthermore, although it does not explicitly refer to the market participant doctrine by name, the first question presented in the petition clearly encompasses the market participant issue.

Consequently, we urge the Court to address this issue now.

The market participant doctrine was first enunciated and applied by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)—a case which bears little factual similarity to the present case. That case concerned a Maryland statute designed to remove abandoned automobiles from the state by providing a bounty to licensed scrap dealers who received such “hulks” from the owners of the cars or licensed wreckers. An amendment to the state statute enacted in 1974 imposed more exacting documentation requirements on out-of-state processors than on in-state processors, which placed out-of-state processors at a disadvantage in obtaining “hulks” and, hence, state bounties. In response to an out-of-state processor’s Commerce Clause challenge to the Maryland statute, this Court concluded that it did not involve “the kind of action with which the Commerce Clause is concerned,” explaining that “Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead it has entered into the market itself to bid up their price.” 426 U.S. at 805, 806. The Court therefore declined to hold that “the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.” *Id.* at 808. Instead, it concluded that “[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.” 426 U.S. at 810 (footnote omitted).

Significantly, the Court in *Alexandria Scrap* suggested that it might not have reached the same result if the market affected by the bounty scheme had not been “created” by the state. 426

U.S. at 809 n.18.³⁸ As Justice Stevens also emphasized in his concurring opinion,

It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program. Our cases finding that a state regulation constitutes an impermissible burden on interstate commerce all dealt with restrictions that adversely affected the operation of a free market. This case is unique because the commerce which Maryland has "burdened" is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile scrap-processing business.

By artificially enhancing the value of certain abandoned hulks, Maryland created a market that did not previously exist.

426 U.S. at 815.

Four years later, this Court again upheld a state residence preference program on the ground that the state had simply acted as a market participant. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). *Reeves* involved a state-owned and operated cement plant. Because of a cement shortage, the State Cement Commission had decided to confine the sale of cement from the plant to state residents. In response to a Commerce Clause challenge by an out-of-state cement distributor, this Court held that the Commission's action did not violate the Commerce Clause since the state was acting as a market participant

³⁸ As explained by the Court,

[w]e note that the commerce affected by the 1974 amendment appears to have been created, in whole or in substantial part, by the Maryland bounty scheme. We would hesitate to hold that the Commerce Clause forbids state action reducing or eliminating a flow of commerce dependent for its existence upon state subsidy instead of private market forces. Because the record contains no details of the hulk market prior to the bounty scheme, however, this issue is not clearly presented.

426 U.S. at 809 n.18.

rather than as a market regulator. In so doing, the Court emphasized that "[r]estraint in this area is counseled by considerations of state sovereignty, the role of each State as 'guardian and trustee for its people' . . . and the 'long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal'" 447 U.S. at 439 (citations omitted; footnotes omitted). Significantly, however, the Court indicated that it was not addressing "the limits imposed on state proprietary actions by the 'foreign commerce' Clause," noting only "that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged." 447 U.S. at 438 n.9.

Moreover, *Reeves* clearly distinguished a manufactured good like cement from natural resources "like coal, timber, wild game, or minerals," explaining that

[cement] is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders. . . . Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.

447 U.S. at 444 (citations omitted; footnote omitted). In so doing, this Court emphasized that the State of South Dakota had borne substantial risk in establishing the cement plant, 447 U.S. at 446 n.19, and that invalidation of the state preference program would "rob South Dakota of the intended benefit of its foresight, risk and industry." 447 U.S. at 446.

The third and most recent of this Court's decisions addressing the "market participant" doctrine is *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983), discussed, *supra*, at 26. There this Court, in response

to the dissent's argument that "regulation" rather than "market participation" was involved,³⁹ acknowledged that there were still some yet undefined limits to the market participant doctrine, but concluded that

[w]herever the limits of the market participation exception may lie, we conclude that the executive order in [that] case falls well within the scope of *Alexandria Scrap* and *Reeves*.

103 S. Ct. at 1046-47 n.7.

As the Court recognized in *White*, the precise limits to the market participant doctrine have yet to be defined. *Id.* See also Anson & Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 88 (1980). Whatever those limits are, however, here, unlike the case in *White*, Alaska's preference program falls well outside the scope of *Alexandria Scrap* and *Reeves*. This is for several reasons.

First, as the district court below noted, the market participant exemption here is being invoked to hoard state-owned *natural resources* found "by happenstance" within the state, not a "manufactured good" produced at a "costly physical

³⁹ The dissent in *White* (written by Justice Blackmun) emphasized that where the state imposes residence preference requirements as conditions to its contracts with private parties, it is acting more as a market regulator than as a market participant, and hence, is not entitled to the market participant exemption:

The simple unilateral refusals to deal the Court encountered in *Reeves* and *Alexandria Scrap* were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, "long recognized" as the right of traders in our free enterprise system. The executive order in this case, in notable contrast, by its terms is a direct attempt to govern private economic relationships. The power to dictate to another those with whom he may deal is viewed with suspicion and closely limited in the context of purely private economic relations. When exercised by government, such a power is the essence of regulation.

103 S. Ct. at 1050.

plant" built with state taxpayer money, and at substantial risk to the state as was the case in *Reeves*. See also *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982) (characterizing the *Reeves* market participant exemption as one that allows states to confine to its residents the sale of goods it produces).⁴⁰ As this Court established in *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), state ownership of a natural resource does not necessarily in and of itself provide a constitutionally sound basis for a state to favor its own residents in the disposition or use of that resource. See also *Hughes v. Oklahoma*, 441 U.S. 322 (1979). This situation is quite different from that where a state favors its own residents in the distribution of manufactured goods created at a manufacturing facility built with the residents' tax dollars (as was the case in *Reeves*), or where the state itself has "created" a market through a subsidy funded by state tax dollars (as was the case in *Alexandria Scrap*). Here, Alaska is restraining the foreign and interstate export of a natural resource which is "by happenstance" located in the state. That should not be permissible under the market participant doctrine. See Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 Geo. Wash. L. Rev. 601, 625 (1982).⁴¹

Second, the Alaska requirement, unlike that in *White*, exceeds the "limits on a state or local government's ability to

⁴⁰ Similarly, in *Sporhase*, this Court characterized *Reeves* as involving "a good publicly produced and owned in which a State may favor its own citizens in times of shortage." 102 S. Ct. at 3464-65.

⁴¹ This is especially true in the case of Alaska, whose natural resources were originally purchased by the United States from Russia and then given *gratis* to the state. See *Hicklin v. Orbeck*, 437 U.S. 518, 528 n.11 (1978). As one commentator has noted, "[i]n any case where the state's wealth does not derive from the contributions of residents acting through the state, there is good reason to adhere strictly to obligations of interstate equality" and "[t]hat is especially true when the national government conveys property to a state without compensation." Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 557 n.238 (1981).

impose restrictions that reach beyond the immediate parties with which the government transacts business." *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. at 1046 n.7. Unlike the situation in *White*, the Alaska primary manufacture requirement does not involve "a discrete, identifiable class of economic activity in which the city is a major participant" in the sense that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Id.* Here, the situation is more akin to that in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), which, unlike *White*, involved natural resources.

In *Hicklin*, this Court struck down under the Privileges and Immunities Clause an Alaska statute that required that all oil and gas leases, easements and right-of-way permits for oil and gas pipelines to which the state was a party require that qualified residents be hired in preference to non-residents. Relying extensively on the "mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause," and Commerce Clause precedents which "establish that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce," *id.* at 531, 533, this Court concluded that the Alaska statute imposed downstream conditions which far exceeded Alaska's legitimate proprietary interest in its oil and gas resources. In so doing, it explained that "the breadth of the discrimination mandated by [the statute] goes far beyond the degree of resident bias Alaska's ownership of the oil and gas can justifiably support." 437 U.S. at 534. Alaska's ownership of the natural resources was not sufficient to justify the discrimination in *Hicklin*, because Alaska had "little or no proprietary interest in much of the activity swept within the ambit of" the statute and "the connection of the State's oil and gas with much of the covered activity [was] sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents." 437 U.S. at 529.

Hicklin bears marked similarity to the present case. In *Hicklin*, Alaska in effect told those to whom it provided commercial access to its oil and gas reserves that they would have to hire Alaska residents if they wanted to be eligible to exploit those reserves; in this case, Alaska is doing essentially the same thing by telling potential purchasers of its timber they can deal only with Alaska processors. See Contract (J.A. at 88a) ("[t]imber cut under this contract shall not be transported for primary manufacture outside the State of Alaska . . ."). This Alaska cannot do, since "the power the States may have to discriminate in favor of their in-state residents and businesses in the distribution of state-owned natural resources does not permit the States to attach conditions to the use or disposition of the resources that might independently burden interstate commerce or some other constitutionally protected interest." Hellerstein, *Hughes v. Oklahoma: The Court, The Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 79 (1980). See also Anson & Schenckan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 77 (1980) [hereinafter "Anson & Schenckan"]. In other words,

[t]he apparent concern [in *Hicklin*] was that Alaska had attempted to pyramid its ownership of oil and gas into control of the private sector on such a wide basis that the program of conditional distribution was barely distinguishable from regulation. But resemblance to regulation would be equally apparent if Alaska had only required direct contractors to favor resident interests, for the virtually coercive power that accompanies control of such scarce and valuable resources would be fully as effective as regulation in causing immediate contractors to bias their business decisions. It was really the conditions placed on eligibility to exploit the state resources, together with the state's bargaining power, that raised the problem—not the breadth of the program.

Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 562 (1981) [hereinafter "Varat"]. Such "conditions placed on eligibility to exploit the state[s] resources" are

precisely what are at issue here, and they should be invalidated here, as they were in *Hicklin*.

Thus, Alaska's conditional sale of its natural resources is, quite simply, an act of regulation. Although the line between "market participant" and "market regulator" is not always easy to draw,^a Alaska's effort to protect its wood processing industry clearly falls in the latter category. Alaska is not a participant in the logging or milling business. Alaska is not, therefore, a participant in the market it seeks to affect. The primary manufacture requirement is an effort to leverage the influence of the state's prior ownership of the timber to a downstream market. The regulatory nature of the state's conduct could not be clearer.

Third, unlike *Alexandria Scrap*, *Reeves*, and *White*, the primary economic impact of the Alaska scheme is on out-of-state consumers rather than in-state taxpayers. Each of the earlier cases involved primarily an intra-state program financed by local tax dollars, with only incidental out-of-state effects. By contrast, the timber industry in Alaska is overwhelmingly an export industry. This means that the costs of the state-imposed restraint would be on consumers outside Alaska. By contrast, a significant part of the cost of the preference scheme at issue in *White* would fall on Massachusetts taxpayers and citizens; and this is equally so for the taxpayers in Maryland for the scheme in *Alexandria Scrap* and the South Dakota taxpayers for the scheme at issue in *Reeves*.

Fourth, unlike *Alexandria Scrap*, *Reeves*, and *White*, this case primarily involves foreign commerce, and as this Court suggested in *Reeves*, this fact alone may call into serious doubt the propriety of applying the market participant doctrine. Indeed, to the extent that the market participant doctrine rests upon fundamental notions of state sovereignty, *Reeves, Inc. v. Stake*, 447 U.S. at 438, it is questionable whether the

^a See, e.g., *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981).

exemption, whatever its purposes and limits in the interstate commerce context, should be applied at all where barriers to foreign commerce are imposed. As this Court noted in *Japan Line*:

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress' power to regulate foreign commerce could be so limited.

441 U.S. at 449 n.13. In short, even if the market participant doctrine could conceivably be found to immunize Alaska's protectionist preference scheme with regard to interstate commerce (which under this Court's decisions and for the reasons stated herein it should not), it certainly does not follow that it should also immunize such a scheme if its primary burden falls on foreign commerce, as is the case here.

Finally, Alaska has done what South Dakota in *Reeves* did not: it has imposed an absolute ban on the export of a product (i.e., unprocessed logs no longer owned by the state),⁴³ on the sole ground that it was harvested from state-owned lands. Whatever the appropriate limits to the market participant doctrine are with regard to state subsidies, surely an absolute state-imposed prohibition such as that at issue here far exceeds the legitimate reach of that doctrine. See *Hughes v. Alexandria Scrap*, 426 U.S. 794, 806 (1976) (where this Court noted that Maryland "ha[d] not sought to prohibit the flow of hulks").⁴⁴

⁴³ Under the proposed contract, ownership would pass when the timber was "paid for, cut and scaled." (J.A. at 64a). Thus, Alaska here is attempting to regulate the disposition of a product it no longer owns.

⁴⁴ Here, the district court found "that less burdensome means are available to the State to achieve the same end. For example, the state may implement a statutory scheme which encourages in-state processing rather than action which bars out-of-state processing." (511

In sum, therefore, the market participant doctrine should not be applied here where (1) the article of commerce at issue is not a manufactured good produced at a "costly" plant established by the state, and is readily producible by other states as well, but rather a natural resource which "by happenstance" is located within Alaska; (2) the state has not created a market by a state-financed subsidy program; (3) the state policy restrains not only the immediate party in its relationship with the state but attaches "downstream" conditions as well; (4) the primary economic impact of the state scheme is on out-of-state consumers rather than in-state taxpayers; (5) the state restriction impacts most directly on foreign commerce rather than interstate commerce; and (6) the state restraint involves not a subsidy, but a total ban on the export of a natural resource beyond the state's borders.

If the market participant doctrine is applied to these extreme facts, then the concern of the dissenters in *Alexandria Scrap* and *Reeves* about the absence of any "limiting principles" will become a reality (see *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 829; *Reeves, Inc. v. Stake*, 447 U.S. at 453); and it will not be difficult to "foresee future state actions 'set[ting] barrier[s] to traffic between one state and another as effective as if customs duties . . . had been laid upon the thing transported.'" *Hughes v. Alexandria Scrap Corp.*, 426 U.S.

F. Supp. at 144; JA. at 135a). This finding echoes Justice Stevens' observation in *Alexandria Scrap* that the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry." 426 U.S. at 816 (Stevens, J., concurring). This Court has made it clear, however, that absolute bans on interstate commerce are particularly suspect. As it noted in *Reeves*, "South Dakota [had not] cut off access to its cement altogether, for the [state's] policy [did] not bar resale of South Dakota cement to out-of-state purchasers." 447 U.S. at 444 n.17.

at 829 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)). As was noted by the dissent in *Reeves*,

Since the Court's decision contains no limiting principles, a State will be able to manufacture any commercial product and withhold it from citizens of other States. This prerogative could extend, for example, to pharmaceutical goods, food products, or even synthetic or processed energy sources.

447 U.S. at 453 n. 6. If the market participant doctrine is applied to this case as Alaska has urged, this "prerogative" will also extend to all states which will indeed be able to "withhold," not only their manufactured goods, but also their natural bounties "from [the] citizens of other states." This should not be condoned.⁴⁵

⁴⁵ In part, the market participant doctrine has been criticized on the ground that a "State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy. . . ." Anson & Schenkkan, at 89 n.90 (quoting *National League of Cities v. Usery*, 426 U.S. 833, 849 (1976)). "Even when it acts as a proprietor, a state cannot be equated with private entrepreneurs" for "[a]s Justice Powell noted in dissent in *Reeves*, the State responds to incentives and maximizes values that no private economic actor would respond to or value." Anson & Schenkkan, at 89. In addition, parochial state legislation—whether construed as market participation or regulation—is likely to implicate interstate comity concerns not present when a private entity acts. Thus, even those commentators who have approved the results in this Court's market participant cases have sought to develop principled limitations to the doctrine which seek to preserve the states' interests in fiscal autonomy while recognizing that parochial state actions—in whatever form—threaten fundamental Commerce Clause concerns. See generally Anson & Schenkkan, *supra*; Varat, *supra*; Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 Va. L. Rev. 1073, 1130-35 (1980).

CONCLUSION

The judgment below should be reversed and the case remanded for reinstatement of the district court's judgment.

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IN THE
Supreme Court of the United States

October Term, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

Petitioner,

v.

**ESTHER WUNNICKE, Commissioner of Department of
Natural Resources of the State of Alaska, et al.,**

Respondents,

KENAI LUMBER COMPANY, INC.

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF STATE RESPONDENTS

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QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Ninth Circuit correct in concluding that Congress had affirmatively endorsed, and thereby removed from the negative implications of the Commerce Clause, Alaska's requirement of in-state primary manufacture for timber purchased from the state?

2. Do the negative implications of the Commerce Clause apply, in any event, to a state's decision to restrict sales of its publicly owned timber to purchasers who agree to comply with its in-state primary manufacturing requirement?

3. If the negative implications of the Commerce Clause do apply to a state's decision to restrict its timber sales to purchasers who agree to comply with its in-state primary manufacturing requirement, does such a requirement run afoul of the Commerce Clause, given the unique facts and circumstances underlying federal and state timber policy in Alaska that have supported such a requirement for more than 50 years?

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF STATE RESPONDENTS

STATEMENT OF THE CASE

For the past half-century, the federal government has singled out Alaska as the object of an unwavering timber policy to encourage the growth of the state's local wood processing industry. The policy was designed both to foster the development of the Alaska economy and to provide adequate wood processing capacity for timber from national forests in Alaska. See C. Kerr and M. Wibbenmeyer, *Alaska Log Export Policy* (1979), Clerk's Record [hereinafter "CR."] 4, Ex. 11, at 11, 16-17, 41-42 [hereinafter "Kerr Study"]; G. Lindell, *Log Export Restrictions of the Western States and British Columbia* (1978), J.A. 104a-107a [hereinafter "Lindell Study"].

The federal government's unprocessed timber export policy for Alaska was first enunciated in 1928 when virtually all of Alaska was in federal ownership. In that year, the Secretary of Agriculture adopted as policy the

recommendation of the Chief Forester of the United States Forest Service that no timber harvested from national forests in Alaska should be exported from Alaska in unprocessed form without the prior consent of the Regional Forester. *Lindell Study*, J.A. 105a. See 36 C.F.R. § 221.2 (1939). At the time there were two national forests in Alaska: the Tongass, covering all of Alaska's southeastern panhandle, and the Chugach, covering most of southcentral Alaska.¹ Eventually, the Forest Service adopted regulations to encourage local wood processing industry development in the territory by severely limiting the conditions under which Alaska exports could occur. 36 C.F.R. § 221.3(c) (1949); *Kerr Study*, CR. 4, Ex. 11, at 28. Those regulations, and the factors motivating them, remain substantially intact today. See 36 C.F.R. § 223.10(c) (1982), reprinted at Pet. App. 32a-36a.

As both Congress and the Executive branch have recognized, Alaska has long been considered "a special case" for purposes of federal timber policy and the development of in-state timber milling capacity.² Federal authority has

1. The Act of June 4, 1897, ch. 2, § 1, 30 Stat. 11, 35, 16 U.S.C. § 476 (repealed 1976) authorized the sale of timber on national forests "to be used in the State or Territory in which such timber may be situated, respectively, but not for export therefrom." Beginning with the Act of March 3, 1905, Pub. L. No. 138, ch. 1405, 33 Stat. 861, 873, making the annual appropriation to the Department of Agriculture, Congress waived the Act of June 4, 1897's prohibition on timber exports from forest reserves, and did so annually thereafter. See H.R. Rep. No. 208, 69th Cong., 1st Sess. 1-3 (1926). The creation of the Tongass and Chugach National Forests began in 1902 and 1907, respectively, with the issuance of the first in a series of executive orders that slowly expanded the size of the forests. Proclamation No. 37, August 20, 1902, 32 Stat. 2025; Proclamation of July 23, 1907, 35 Stat. 2149. In 1926, Congress made permanent its annual waiver of the forest reserve export prohibition, subject to the proviso that the Secretaries of Agriculture and Interior make a finding that the supply of timber for local use was adequate, apparently a determination never made one way or the other until 1968. See Act of April 12, 1926, 16 U.S.C. § 616 (1974), and Note 3 *infra*.

2. *Effect of Lumber Prices and Shortages on the Nation's Housing Goals*, S. Doc. No. 27, 91st Cong., 1st Sess. 55 (1969). And see *Alaska - Its Resources And Development - Message From the President of the United States*, Franklin D. Roosevelt, H. R. Doc. No. 485, 75th Cong.,

long existed for the extension to other states of limitations similar to those imposed upon the exportation of unprocessed timber cut in Alaska. Organic Administration Act of June 4, 1897, 16 U.S.C. §§ 476, 551 (repealed 1976). Nonetheless, for 40 years, the only state or territory that was in fact subject to a federal in-state (or in-territory) primary manufacturing requirement was Alaska. In other states, unprocessed timber from national forests had been freely exported, notwithstanding 1926 federal legislation that allowed the exportation of timber taken from national forests *only* upon a finding that "the supply of timber for local use will not be endangered thereby." Act of April 12, 1926, 16 U.S.C. § 616 (1974). Indeed, it was concern over foreign exports of timber from states other than Alaska that finally led Congress in 1968 to enact legislation placing a 350 million board foot quota upon the sale for export of unprocessed timber from federal lands located west of the 100th meridian (a line running roughly from the middle of North Dakota through central Texas).³

Although Alaska was included within the scope of the 1968 legislation extending the restriction on the export of unprocessed timber to other states (the "Morse

Footnote 2 (con't)

3rd Sess. 20-21, 98-101 (1938); *Plywood Supply In Alaska - Letter From The Secretary Of The Interior*, S. Doc. No. 120, pt. 2, 71st Cong., 2d Sess. 9 (1931) ("The timber resources of the Tongass National Forest are managed by the United States Forest Service primarily for the development and maintenance of a permanent pulp and paper manufacturing industry")

3. As explained in the Senate Report accompanying the legislation:

In recent years, foreign purchasers of federally owned unprocessed timber have bid up prices thereby contributing to skyrocketing domestic lumber prices and forced the closure of many mills in the northwestern United States which could not obtain enough timber to remain in business

There is no record of any finding of surplus having been made within the last 20 years, despite the requirement of the 1926 Act.

S. Rep. No. 1479, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 3957, 3971.

Amendment"⁴), the legislation was not intended to modify pre-existing federal timber policy in Alaska. Nor was it construed to do so. Alaska continued to be treated as "a special case", as it had been since 1928. Thus, the Secretaries of the Interior and Agriculture allocated the entire 350 million board feet of exempted volume to states other than Alaska. *Lindell Study*, J.A. 105a. This reflected the view that Alaska's timber should generally remain subject to the in-state primary manufacturing requirement for purposes of maintaining the state's wood processing industry.⁵ In 1973, when the Morse Amendment was replaced by the first of a series of riders to Interior Department appropriation bills which effected a complete ban on the export of unprocessed timber from federal lands in the West, the rider applied only to lands "in the contiguous 48 States," thereby excluding Alaska. See *Department of the Interior and Related Agencies Appropriation Act, 1974*, Pub. L. No. 93-120, § 301, 87 Stat. 429; *Department of the Interior and Related Agencies Appropriation Act, 1983*, Pub. L. No. 98-146, § 302. Federal timber policy toward Alaska, however, remained unchanged, and continued in effect through successive Forest Service regulations. 36 C.F.R. § 221.3(c) (1949); 36 C.F.R. § 223.10(c) (1982).

When Alaska was admitted to the Union in 1958, Congress granted it approximately 104 million acres of land, which the state was to select over the course of the next 25

4. Pub. L. No. 90-554, § 401, 82 Stat. 966, 16 U.S.C. § 617 (1969). In addition to providing a quota for the export of unprocessed timber from the West, the Morse Amendment provided for the Secretaries of the departments administering federal lands to declare specified amounts of unprocessed timber as surplus to domestic needs and thus eligible for export. *Id.*

5. As a result of a hearing held in Juneau on May 5, 1969, Alaska cedar and western red cedar were declared surplus on federal lands in Alaska and thus eligible for export. *Lindell Study*, J.A. 97a. By mid-1976, however, with indications that the surplus of western red cedar in Alaska was decreasing, the Forest Service began to require proof that logs had been first offered for sale to domestic manufacturers before considering export applications and, shortly thereafter, it established that Alaska western red cedar was no longer in surplus and would be exportable only if in-state primary manufacturing requirements were satisfied. *Lindell Study*, J.A. 106a.

years.⁶ Congress hoped that the extraordinary land grant to the state, largely undeveloped, would provide an adequate resource base upon which the state could develop local industry and become master of its own destiny.⁷ In fashioning its own policy toward certain forested tracts it received from the federal government, the fledgling state sought guidance in the long standing federal policy toward publicly owned lands in Alaska, the objective of which was the broadening of Alaska's economic base by "broadening the processing base, not the logging base." *Kerr Study*, CR. 4, Ex. 11, at 39. This federal policy and objective thus became shared in common with the new state government.⁸

Consequently, in 1960 the state adopted an in-state primary manufacturing requirement that differed little in substance from the preexisting and continuing federal requirement. Alaska Admin. Code tit. 11, § 76.130 (July 20, 1960, repealed 1982), reprinted at Pet. App. 20a. Depending on the log's quality, a processor can satisfy the primary manufacturing requirement by making cants, slabs, planks, pulp, green veneer for plywood, poles or piling, or chips. Pet. App. 20a.

6. Statehood Act, 48 U.S.C. note preceding § 21 (as amended, 1980). In 1980, due to the very slow pace of patenting of lands to Alaska, Congress extended the 25 year period to 35 years.

7. As the House Report accompanying the Statehood Act, H.R. Rep. No. 624, 85th Cong., 1st Sess. 8 (1958) observed:

H.R. 7999 will enable Alaska to receive full equality with existing States not only in a technical juridical sense but in practical economic terms as well. It does this by making the new State master in fact of the natural resources within its borderlines

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[A] long list of potential basic industries in the Territory, including the forest industries can exist in Alaska only as tenants of the Federal Government, and on the suffrance of various Federal agencies. The committee considers that to be an unhealthy situation.

At the time of Alaska's admission to statehood, the federal government still owned 99% of the land in the Territory of Alaska. *Id.* at 5.

8. The state's declaration of purpose behind the primary manufacturing requirement has taken the form of policy statements of its governors, J.A. 31a-32a, and legislative resolutions, J.A. 30a, 52a.

With limited exceptions, Alaska has steadfastly adhered to this requirement in sales of timber from state lands. And it has seen the salutary results of both the preexisting federal timber sale program and of its own timber sale program in the emergence of local timber processing operations that have contributed to the growth of the state's fragile economic infrastructure. See State of Alaska, House of Representatives, Resolve No. 3 (1979), J.A. 52a.

In 1969, Alaska held an auction (called Icy Cape No. 1) for the sale of some 207 million board feet of its timber located in the Icy Bay area on the Gulf of Alaska. South-Central Timber Development Co., Inc.⁹, the petitioner here, was the only, and winning, bidder at the auction. Contrary to South-Central's assertion at Brief, 5, the sale *was* subject to the state's primary manufacturing requirement, which term was an integral part of the contract and constituted a substantial part of the consideration flowing from South-Central to the state.¹⁰ South-Central honored this requirement for the first eight years of the contract.¹¹ In 1979, South-Central sought a release from the primary manufacturing requirement because it chose not to invest the necessary capital to comply with the state's air pollution control laws at the company's Jakalof Bay mill, where it was processing the timber. There is no evidence in the record that South-Central sought the waiver because it was unable to sell to out-of-state customers the Icy Cape No. 1 timber it primarily manufactured in-state. In consideration for Alaska's waiver of its in-state primary

9. South-Central is an Alaska domestic corporation. J.A. 5a. In 1980, it was a wholly owned subsidiary of Iwakura-Gumi Lumber Co., Ltd., a Japanese corporation, and had a branch office in Portland, Oregon. J.A. 57a. As of February 1983, it became a wholly owned subsidiary of a Washington corporation. Brief, ii.

10. See *Kenai Lumber Co. v. LeResche*, 646 P.2d 215, 217 (Alaska 1982). Prior to 1978, South-Central received permission to export 3.2 million board feet of spruce in unprocessed form. This limited waiver was the only exception to the in-state primary manufacturing requirement granted from 1969 through 1978 in connection with Icy Cape No. 1. *Id.*

11. *Id.* at 217-19.

manufacturing requirement, South-Central agreed to reimburse the state by substantially increasing the contract price for the remaining uncut timber from \$7 to \$80 per thousand board feet of spruce and from \$2 to \$28 per thousand board feet of hemlock.¹²

By 1980, a suspension of federal timber sales in Alaska had denuded the market of timber supply, jeopardizing the survival of existing forest product industries in Alaska, including South-Central. *Complaint*, §§ 22-23, J.A. 11a. This greatly concerned the state, since it was heavily dependent on nonrecurring sources of revenue to pay its expenses, and the forest products industry represented a source of recurring revenue from a renewable resource. J.A. 41a. The economic and employment implications caused by the timber shortage prompted the legislature to pass a special \$45,800 appropriation to cover the costs of a second Icy Bay area timber sale. 1980 Alaska Sess. Laws, ch. 50, § 130 (1980). Using 26 state employees to prepare for the sale, the state then announced its second Icy Bay auction (called Icy Cape No. 2) for approximately 49 million board feet of timber. J.A. 37a, 41a. As in the past, the state intended to require in-state primary manufacturing as partial consideration for the contract in furtherance of its policy, now two decades old, of developing and sustaining its local wood processing industry. The state recognized, of course, as does the federal government when it administers its own in-state primary manufacturing requirement, that part of the consideration it receives from the purchaser is the agreement to such a requirement, thereby substantially reducing the cash it receives.¹³ But the state has made the judgment, as has the federal government, that the creation of local employment

12. *Id.* at 217 n.1, 218.

13. "In order to make local manufacturing attractive, the Forest Service adjusts stumpage fees downward to offset the high manufacturing costs. This causes total revenues generated from timber sales to be much less than they would be if the export of timber in round log form were permitted." S. Rep. No. 413, 96th Cong., 1st Sess. 225 (1979) (accompanying H.R. 39, Alaska National Interests Lands legislation).

opportunities and the maintenance of a viable local wood processing industry more than offset the additional cash it would receive in the absence of such a requirement.¹⁴

Before the Icy Cape No. 2 auction was held, South-Central brought suit in federal district court seeking to enjoin the sale on the ground, among others, that Alaska's in-state primary manufacturing requirement violated the negative implications of the Commerce Clause. The district court, while recognizing that congressional consent to state actions removes them from the negative restraints of the Commerce Clause, found no such consent. In reaching its conclusion, the court paid scant attention to the federal government's discrete Alaska timber policy, concluding only that "Congress has not consented to any primary manufacturing requirements imposed by the states." 511 F. Supp. 141, J.A. 131a. Without the benefit of this Court's decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983), the court further decided that the negative implications of the Commerce Clause apply to a state's choice of terms on which it sells its own resources. 511 F. Supp. 142-143, J.A. 131a-133a. Finally, the court summarily concluded that Alaska's in-state primary manufacturing requirement violated traditional Commerce Clause criteria governing state regulations, according little weight to the sensitive interplay of the shared federal and state interests and objectives for Alaska. *Id.* at 143-144, J.A. 133a-135a.

14. The *Kerr Study* reports:

Equity considerations concerning export policies are related to who gains and who pays. Taxpayers as a whole bear many costs of public forestry, including costs of non-commodity outputs. Wood purchasers pay for their use of public timber and may pay directly for all its value. To the extent that taxpayers are not receiving . . . the higher revenues possible with export of round logs . . . the current policy is inequitable. However, to the extent that local sawmills are kept running and jobs sustained, it is equitable if taxpayers are willing to accept this lower return in exchange for more jobs and processing capacity. (Emphasis in the original.)

The United States Court of Appeals for the Ninth Circuit unanimously reversed. Without reaching South-Central's Commerce Clause claim, the court concluded that "Congress has acted to validate the state policy." 693 F.2d 892, J.A. 142a. Although South-Central asserted that Congress had not been explicit enough in evidencing its approval of Alaska's timber policy, the court responded that there are instances "where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the law is to favor local interests." *Id.* at 893, J.A. 142a.

On November 17, 1983, the state proceeded with the Icy Cape No. 2 timber auction without insisting on its in-state primary manufacturing requirement. The state made the judgment that the currently prevailing market conditions and unique characteristics of the sale were such that a primary manufacturing requirement would not help develop local industry or create employment. See explanatory documents in the appendix to this brief, submitted with the consent of South-Central. Like the federal government, the state nevertheless remains fully committed to its general policy of requiring in-state primary manufacture of its timber, and its regulations retain their force for use in other timber sales as future conditions may warrant.

SUMMARY OF ARGUMENT

1. When Congress has put its imprimatur upon state action, it is well settled that such action is invulnerable to challenge under the negative implications of the Commerce Clause. Congressional policy for Alaska, as implemented by explicit federal agency guidelines, has affirmatively endorsed an in-state primary manufacturing requirement for timber cut from publicly owned lands in Alaska and has thereby removed it from Commerce Clause scrutiny. The federal policy derives from the federal government's recognition that the development of a local wood processing industry in Alaska is in the national interest and that this interest should be protected by requiring in-state primary processing of

timber cut from federal lands in Alaska prior to transportation in interstate or foreign commerce.

The policy is a long standing one, and has been repeatedly reaffirmed by Congress and its responsible agencies. In admitting Alaska to the Union, Congress intentionally created a state government with powers over its own timber land which could be used to double the federal effort to create a timber processing base critical to the development of timber resources inside Alaska. As the court of appeals unanimously concluded, Alaska's own requirement for in-state primary manufacturing of timber purchased from the state "could not be more in keeping with federal timber policy." 693 F.2d 893, J.A. 144a. Given the overwhelming indicia of congressional intent favoring in-state manufacturing, that intent would be frustrated by inflexibly applying a rule of explicitness here, where the applicable state policy and regulations sound "a harmonious note" with the federal policy, *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S.Ct. 1042, 1047 (1983), and reinforce a half-century of carefully designed federal policy for Alaska.

2. Even if Congress had not consented to Alaska's in-state primary manufacturing requirement, the Commerce Clause would not inhibit the state's action. In a series of recent cases, this Court has made it clear that when a state acts as a participant in the market, rather than as its regulator, the negative restraints of the Commerce Clause simply do not come into play. As a seller of its own timber, Alaska has acted as a participant in the market and is free to choose the terms on which it deals with its prospective purchasers.

The distinction South-Central and the Solicitor General propose between natural resources and other state owned goods is neither workable nor constitutionally based, especially in light of the substantial investment the state has made in both managing its timber resources generally, and in preparing for the Icy Cape No. 2 sale in particular. The record is bare of any evidence that the state's requirement impedes the flow of timber out-of-state or affects out of state consumers at all. Indeed, the contrary is true

since Alaska not only creates a flow of timber in the market, but it also chooses to reduce the cash consideration it receives when it sells timber subject to a primary manufacturing requirement in order to, in effect, pay for in-state processing. For analogous reasons, the claim, briefed in detail for the first time in this Court, that Alaska's in-state processing requirement burdens foreign commerce, has no economic or legal basis. Should the court be troubled by this question, however, a remand to permit the parties to develop an adequate record on this issue is the only appropriate remedy, as the Solicitor General has suggested. U.S. Brief in Support of Petition for Certiorari, 5, 11; U.S. Brief, 16.

3. Even if the negative implications of the Commerce Clause are found applicable to this special case, they provide no basis for a reversal of the court of appeals' judgment. As this Court has consistently recognized, the implied limitations that the Commerce Clause imposes on state legislation involve a delicate balancing of state and national interests. Beyond the traditional conflict between a state's interest in sustaining its local economy and the national interest in the free flow of commerce, there is in this case an additional and dispositive factor - a distinct federal policy favoring the particular state action under consideration. Even if that policy has not been declared with sufficient explicitness to remove the case altogether from the negative restraints of the Commerce Clause, it is nonetheless of such substantial weight to sharply tilt the Commerce Clause balance in favor of the challenged state action in order to effectuate national policy.

ARGUMENT

- I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT CONGRESS HAS ENDORSED ALASKA'S IN-STATE PRIMARY MANUFACTURING REQUIREMENT AND THEREBY REMOVED IT FROM THE NEGATIVE IMPLICATIONS OF THE COMMERCE CLAUSE.

- A. Congressional Timber Policy Affirmatively Sanctions Alaska's In-State Primary Manufacturing Requirement.

Throughout the federal government's long and intimate involvement with timber policy in Alaska, one theme predominates: the desire to develop and sustain Alaska's local wood processing industry. That policy was first articulated in the Secretary of Agriculture's 1928 decision to limit the export of unprocessed logs from the Territory. It has continued uninterrupted to the present day in regulations that limit the export of unprocessed logs from the state:

Unprocessed timber from National Forest System Lands in Alaska may not be exported from the United States or shipped to other states without prior approval of the Regional Forester. This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that state for the sustained utilization of timber from National Forests which are geographically isolated from other processing facilities.

36 C.F.R. § 223.10(c) (1982).

The current regulations reflect three long standing features of congressional timber policy toward Alaska that evidence approval of the state's virtually identical policy.

First, federal timber export law and policy has since 1928 treated Alaska differently. Alaska was especially singled out for perpetual export ban treatment in 1928, when federal policy forbidding the export of unprocessed logs from Alaska national forest lands was initially put in place. J.A. 105a. That policy was applied to Alaska *alone* for the next 40 years. In 1968, when Congress became concerned over exports to foreign ports from states other than Alaska, Alaska was

temporarily included within the scope of a near complete ban on foreign exports of unprocessed logs from all federal lands in the west (the Morse Amendment), with Congress only allowing a maximum export of 350 million board feet of unprocessed timber. Yet even that restraint was administered in accordance with federal policy barring export of unprocessed logs from Alaska, because the entire 350 million board feet export allowance was allocated to other states. J.A. 105a. Subsequently, a complete ban on foreign exports of unprocessed logs from the west was substituted for the Morse Amendment through appropriation riders starting in 1973. Alaska was excluded from the scope of that ban and instead was thereafter governed by the cited regulations, which were designed specifically for Alaska and which barred shipment of unprocessed Alaska logs to *other states* as well as to foreign countries. J.A. 98a. In short, in suggesting that its own in-state manufacturing requirement has been affirmed by Congress, Alaska simply relies on a specific Alaska-based policy that the federal government has followed for over a half-century.

Second, the federal government has not only singled out Alaska for unique treatment under federal timber laws, it also has carefully shaped its treatment in order to confront atypical problems the state faces in developing a timber processing industry. The current regulations plainly reveal the federal purpose: "to ensure the development and continued existence of adequate wood processing capacity in [Alaska] for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities." 36 C.F.R. § 223.10(c) (1982). The federal primary manufacturing requirement is thus rooted in a desire to assure the vitality of the geographically isolated *local* wood processing industry. The governing regulations effectuate this end by banning both *foreign and interstate* shipment of unprocessed timber, by embracing all timber within the ban, and by limiting any potential exceptions to five very specific situations. *Id.*; J.A. 105a.

The State of Alaska's own timber policy, under attack here, has responded to the obviously identical factual

situation in nearly the identical way. Its policy is also designed to develop and sustain the capacity of the Alaska wood processing industry. J.A. 30a-32a, 52a. The policy does so by requiring purchasers of state owned timber to initially process it in-state before exporting it to whatever destination they choose. *See* Alaska Stat. § 38.05.115 (1976) and Alaska Admin. Code tit. 11, § 71.230 (1982), reprinted at Pet. App. 19a-21a. The Alaska primary manufacture requirement applies to the same markets, embraces the same timber, and allows for the same exceptions as do the federal regulations for federal land. To resist the court of appeals' conclusion that Congress has approved Alaska's policy, which is directed at the same federal objective, reinforces the identical federal policy, and tracks federal implementing rules, defies both congressional intent and common sense.

Third, South-Central and the Solicitor General can avoid the clear expression of congressional policy sanctioning Alaska's in-state manufacturing requirement only by focusing largely on federal timber policy towards land in states *other* than Alaska, paying no heed to the federal government's finely tuned Alaska policy. Brief, 27-32; U.S. Brief, 12-13. However, the provision of the current regulations that unprocessed timber may not be exported from Alaska "or shipped to other states" without prior approval of the Regional Forester, 36 C.F.R. § 223.10(c) (1982), furnishes further proof that Congressional intent is unmistakable: it is the *Alaska* wood processing industry in particular, not the domestic wood processing industry in general, that has continuously been the object of federal concern.¹⁵

15. Moreover, Congress expressly intended to give the new state sufficient latitude to make use of its newly acquired timber resources to *complement* federal policy and generate Alaska timber processing industries:

It is impossible for Congress to understand and solve the local problems of this distant area as well or as fast as they could be solved by state government. The rigidity of Territorial government and the inherent difficulties of acquiring Federal legislation are clearly restricting development of this vast area.

S. Rep. No. 1163, 85th Cong., 1st Sess. 9 (1957) (accompanying S.49, the Senate bill to admit Alaska into the Union).

By contrast, when dealing with states other than Alaska, Congress and responsible federal agencies have, at least in recent years, evinced a concern *not* with the development of a wood processing industry in a particular state, but rather with the provision of timber supplies for all the states viewed *collectively*. Thus, the Morse Amendment and the more recent appropriation riders applicable to states other than Alaska have banned only *foreign* export of unprocessed logs, without providing protection to either the timber supply or industry of any particular state. The implementing federal regulations likewise ban export of unprocessed timber only to *foreign* ports, and do nothing to protect one state's timber supply from the needs of another. 36 C.F.R. § 223.10(b) (1982); 43 C.F.R. § 5400.0-3(c) (1982). It is only with respect to Alaska that one can demonstrate historically that federal policy has reflected an explicit concern with the protection of Alaska's timber processing industry.¹⁶

Over the years, Congress has consistently recognized and approved the continuing policy of requiring in-state manufacturing for Alaska timber for the express purpose of supporting the state's wood processing industry. In 1969, after holding extensive hearings on the problem of timber

16. The specific focus of federal policy on the development of the Alaska timber processing industry also should dispel any fear that an affirmation of the court of appeals' decision in this case would have significant precedential value for other states' primary manufacturing requirements, since federal timber policy for timber lands in Alaska is distinctly different from federal policy pertaining to federal timber land in other states. Moreover, other states' in-state manufacturing requirements do not bear nearly the resemblance that Alaska's does to any alleged federal counterpart. For instance, Idaho requires in-state primary manufacture for timber destined for both foreign and domestic markets, while the federal regulations governing timber land in Idaho require in-state processing prior to foreign export only. *Cf.* Idaho Code § 58-403 (1974) with 36 C.F.R. § 223.10(b) (1982), reprinted at Pet. App. 37a. Unlike the corresponding federal regulation, statutes in California, Idaho, and Oregon all require primary manufacture for all state timber without exception for domestic surplus. *See id.*; Cal. Pub. Res. Code § 4650.1 (West Supp. 1982); Or. Rev. Stat. § 526.805 (1981), all reprinted at Pet. App. 36a-38a.

shortages, a Senate subcommittee issued a lengthy report which not only endorsed the recently enacted Morse Amendment, but also went on to note that Alaska was "a special case":

The development of Alaska, of course, has been inherent in some of the policies that have kept Alaska logs in Alaska. The special case nature of Alaska is evident in the statement of Edward P. Cliff, Chief of the Forest Service, at the hearings In testifying before the Select Committee on Small Business of the Senate last year Mr. Cliff made a statement on Alaska that was repeated in the report of that Committee which sheds considerable light on the Alaska situation. In commenting on the policy since 1928 of requiring timber cut from the national forests of Alaska to be given primary manufacture in Alaska, he stated:

This policy recognizes that the manufacture of Alaskan timber in Alaska rather than its shipment in the raw state for manufacture elsewhere is for the best interests of Alaska. This policy has resulted in the establishment of two major pulpmills and other wood-using plants. We are fostering plans for further installations. We believe that the policy must be continued to help develop Alaska.

Effect of Lumber Prices and Shortages on the Nation's Housing Goals, S. Doc. No. 27, 91st Cong., 1st Sess. 55-56 (1969). See also, *Shortages and Rising Prices of Softwood Lumber: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 93rd Cong., 1st Sess. 562-64 (1973) (Remarks of Alaska Senators Gravel and Stevens concerning in-state primary manufacturing laws used by the state and federal government). More recently, a Senate Report accompanying the Alaska National Interest Lands legislation observed: "Forest Service Policy for the Tongass ... has always required local primary manufacturing for the

purpose of adding growth and stabilization to the local economy." S. Rep. 413, 96th Cong., 1st Sess. 225 (1979).¹⁷

South-Central and the Solicitor General find comfort in the fact that Congress exempted Alaska from 1979 legislation curbing exports of unprocessed red cedar from state owned as well as federally owned lands, drawing the inference that Congress therefore *avored* the export of unprocessed logs from state owned lands in Alaska. See Export Administration Act of 1979, 50 U.S.C. app. § 2406(i) (1979). In fact, the legislative history of the western red cedar exemption demonstrates Congress' continuing recognition and approval of Alaska's in-state primary manufacturing laws. Congress exempted Alaska from the export ban *only* because Alaska had no *processing* capacity for western red cedar. As the House Conference Report accompanying the red cedar restrictions indicates:

The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which provides an exemption to the State of Alaska

17. Senators Metzenbaum and Tsongass expressed these additional views (*id.* in text at 401):

The more immediate threat to sawmilling jobs comes from attempts by the existing industry to gain exemptions from the ban on round log exports. Just as the Native corporations can make these higher profits exporting raw materials, so can these corporations. However, the "primary manufacture law" requires local processing of public timber to provide jobs for the local economy. Timber from the National Forests cannot be exported without processing—in the case of Alaska, this includes "exporting" timber to the lower 48 states. Louisiana-Pacific wants to supply a mill it owns in Tacoma, Washington with timber from its 50-year contract area in Alaska, and is asking for an exemption from the export ban. This would allow it to supply the mill in Tacoma with cheap Tongass timber, rather than having to compete in the more expensive Northwest timber market.

The Tacoma mill now uses Alaskan cants. *Shipping round logs instead is quite simply exporting Alaskan jobs.* The 50-year contracts and primary manufacture laws were designed to provide jobs in Alaska, not to provide cheap publicly subsidized timber to the Pacific Northwest. (Emphasis in the original.)

from application of certain provisions of the Export Administration Act of 1979.

It is the intent of the managers to continue to encourage the Forest Service to restrict administratively the export of unprocessed red cedar logs from Alaska as soon as the capability develops to process such logs in Alaska. (Emphasis supplied.)

H.R. Rep. No. 604, 96th Cong., 1st Sess. 40 (1979). See also, S. Rep. No. 163, 96th Cong., 1st Sess. 110 (1979).

Furthermore, the Solicitor General is plainly wrong in asserting that "neither Congress nor the Secretary of Agriculture has manifested any separate concern with enhancing local employment opportunities" in Alaska. U.S. Brief, 12. When in 1951 the U.S. Forest Service signed the first 50 year timber contract with Ketchikan Pulp and Paper Co. for the Tongass National Forest, it required by contract that the company recruit its labor for logging, milling, and manufacturing operations from residents of southeastern Alaska so far as practicable. *Alaska's Vanishing Frontier - A Progress Report*, Report by William H. Hackett to Subcommittee on Territories and Insular Possessions of the House Committee on Interior and Insular Affairs, 52nd Cong., 1st Sess. 8 (Committee Print 1951). Also, the legislative history of the Statehood Act shows that Congress has long been concerned with the unique problems confronting Alaska's isolated economy, and accordingly federal in-state timber processing policies have been designed "to insure or promote a broad economic base in the form of manufacturing industry," *Kerr Study*, CR. 4, Ex. 11, at 41, consistent with the Executive Branch policy for Alaska

enunciated for the last half-century. See H.R. Doc. No. 485 and S. Doc. No. 120, *supra* n.2.

The court of appeals found that "the state's primary manufacture requirements duplicate those imposed on federal timber and service the same objective, that of promoting industrial developments in isolated areas." 693 F.2d 893; J.A. 143a. It carefully pointed out that "[t]he decision of Alaska's Commissioner of Natural Resources to condition the sale at Icy Cape on primary manufacture was made in the wake of a temporary suspension of federal timber sales from the Tongass and Chugach National Forests." *Id.* The court further observed that "[i]ts purpose was to protect local processors from the resulting slack in demand for their services." *Id.* The court therefore concluded that "[t]he state's decision could not have been more in keeping with federal timber policy." *Id.* Given the abundant evidence of congressional support for Alaska's in-state primary manufacturing requirement, the court of appeals' decision reversing the district court is unassailable.

B. Congress Has Expressed Approval of Alaska's In-State Primary Manufacturing Requirement With Sufficient Explicitness to Remove It From the Negative Implications of the Commerce Clause.

Having determined that congressional policy sanctioned Alaska's primary manufacturing requirement, the court of appeals properly concluded that such congressional approval insulated the requirement from attack under the negative implications of the Commerce Clause. The court noted that this principle is often applied in cases involving express congressional authorization but that "express authorization is not always necessary." 693 F.2d 893; J.A. 142a. "There will be instances," the court continued, "like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." *Id.*

The court of appeals' holding is solidly grounded in sound constitutional policy. It is undisputed that Congress

possesses plenary power to sanction state laws and thereby remove them from the negative implications of the Commerce Clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). In this case, the history of federal timber policy toward Alaska shows that Congress has sanctioned Alaska's primary manufacturing requirement, thus definitively validating the requirement for Commerce Clause purposes.

Relying upon cases in which this Court has found express, statutory congressional authorization of state laws that were challenged under the Commerce Clause, South-Central and the Solicitor General urge the Court to adopt an inflexible rule of literal consent to govern the instant case. Such a rule, however, would disserve its underlying rationale and is unwarranted by this Court's precedents.

The doctrine that congressional consent to state action removes the action from judicial scrutiny under the negative implications of the Commerce Clause recognizes Congress' primacy with respect to the allocation of power over interstate commerce. See *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). When Congress has indicated its approval of state action, courts are deprived of power to second guess the congressional judgment. There is nothing in that principle, however, that requires Congress to display its intentions in any particular form. Indeed, it is Congress' prerogative - not the courts' - to make its policies known in the manner that it sees fit. Whatever way a court might resolve a dispute under the malleable principles of Commerce Clause analysis, once Congress has entered the picture in an affirmative manner, the judicial inquiry is at an end.

The unbending rule of literal consent that South-Central and the Solicitor General espouse flies in the face of the plenary congressional power over commerce on which the rule itself is predicated. It arrogates to the judiciary what is patently a legislative function - determining the ultimate allocation of such power. It is not within the province of judicial power to dictate to Congress the precise manner in which congressional will must be expressed. Nor can a court

ignore that expression of will if it does not comport with a wooden rule of literal consent.

The application of such a wooden rule to the special case here demonstrates its lack of wisdom. Despite a half-century policy supporting a primary manufacturing policy for Alaska timber, South-Central and the Solicitor General would have the Court disregard this policy because Congress has not taken the opportunity to enact legislation that literally and explicitly declares its consent. The result would be to frustrate congressional intent, and would "ignore[] the obvious role played by the regulatory agencies in translating the general into the particular and thus fleshing out the commands of Congress." J. Eule, *Laying The Dormant Commerce Clause To Rest*, 91 Yale L.J. 425, 435 (1982). Moreover, it would saddle Congress, whose enormous legislative agenda plainly precludes it from specifically identifying and addressing literally every state law or policy it believes is consonant with federal policy, with a burden the Constitution did not place upon it.

Clearly, the Court's precedents do not establish an inflexible rule of literal consent as a litmus paper test for ascertaining congressional approval of state laws. The Court's opinion just last Term in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S.Ct. 1042 (1983), makes this plain. In *White*, the Court considered a Commerce Clause challenge to the Boston mayor's executive order requiring that all construction projects funded in whole or in part by city funds be performed by a work force at least half of which were Boston residents. With respect to projects financed in part by federal funds, the Court addressed the question whether federal approval of the local policy obviated any inquiry into the dormant Commerce Clause issue. Examining the pertinent federal statutes and regulations, which, like those applicable to this case, were designed to encourage local industrial development and employment opportunities, the Court concluded that the local executive order was consistent with federal policy and thus immune from Commerce Clause attack. Significantly, the Court

couched its analysis in terms of whether the federal regulations "affirmatively permit" (*id.* at 1047), "affirmatively sanctio[n]" (*id.* at 1048), or "soun[d] a harmonious note" (*id.* at 1047) with the executive order. It did not exalt literal statutory approval into a talisman of congressional consent analysis, as it could not without thwarting the obvious intent of the federal regulations. There is no reason for abandoning that approach in this case, in which the history of analogous federal regulations unmistakably evidences congressional sanction and permits the state action in question.¹⁸

Finally, however appropriate a rule of literal consent might be with respect to broad based state regulation of the private sector, when the state enters the private sector as a mere participant in the market—as Alaska did in selling its timber—the considerations favoring a wooden rule of literal consent are even weaker. Because the state's impact on the market as a mere participant in it will ordinarily be less than its regulation of it, the necessity for explicit congressional approval of the state's action as a safeguard

18. South-Central and the Solicitor General rely on three recent cases in which this Court failed to find a sufficient indication of congressional assent to a state law to remove it from the negative implications of the Commerce Clause: *Sporhase v. Nebraska*, 102 S.Ct. 3456 (1982), *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), and *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980). Brief, 22-26; U.S. Brief, 9-10. In none of these cases, however, was there a specific policy equivalent to the federal government's policy favoring the development of a particular industry in a particular state that is at issue here. Thus, in *Sporhase* the Court refused to infer congressional approval of Nebraska's restriction on the export of ground water from a welter of federal statutes generally indicating congressional deference to state water law but providing no indication of support for Nebraska's particular policy. 102 S.Ct. at 3465-66. In *New England Power*, the Court likewise failed to find in a general savings clause permitting the states to continue to exercise power they lawfully possessed over the exportation of hydroelectric power as sanctioning a prohibition on the export of such power. 455 U.S. at 340-43. And in *Lewis*, the Court found no support in provisions of the Bank Holding Company Act bearing generally on the scope of state power for the specific restriction that Florida had imposed on out-of-state banks. 447 U.S. at 44-49.

against unwarranted interference with the market is correspondingly diminished. Furthermore, respect for state autonomy when it enters the market as a private trader, see *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980), militates against a rule that would fail to respect that autonomy in every case in which Congress had failed to consent explicitly to the state action in question.

II. THE NEGATIVE IMPLICATIONS OF THE COMMERCE CLAUSE DO NOT LIMIT A STATE'S CHOICE OF THE TERMS ON WHICH IT CHOOSES TO DISPOSE OF ITS OWN RESOURCES.

A. Alaska's In-State Primary Manufacturing Requirement Is Invulnerable To Commerce Clause Challenge Under The Court's Decisions In *Alexandria Scrap*, *Reeves*, and *White*.

Even if the Court were to find that Congress had not been sufficiently explicit in its approval of Alaska's primary manufacturing requirement to remove it from judicial scrutiny under the negative implications of the Commerce Clause, the requirement is free from such scrutiny for another, independent reason. When a state acts as a participant in the market rather than as a regulator of it, the Commerce Clause does not restrain the state's action. *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S.Ct. 1042 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Alaska's specification of the contractual terms on which it chooses to dispose of its own timber falls squarely within the holdings and reasoning of the Court's decisions establishing that this is not "the kind of action with which the Commerce Clause is concerned." *Id.* at 805.

In *Alexandria Scrap*, the Court sustained over Commerce Clause objections a Maryland statute designed to encourage the destruction of abandoned automobiles through payments of cash bounties to scrap processors. Even though the scheme favored local interests by imposing more burdensome documentation requirements on out-of-state than on in-state processors, the Court upheld it. The Court distinguished

cases involving burdensome state regulations of interstate commerce from the case before it in which Maryland had "entered into the market itself", 426 U.S. at 806, "as a purchaser, in effect, of a potential article of interstate commerce." *Id.* at 808. The Court concluded that "[n]othing in the purposes animating the Commerce Clause prohibits a State ... from participating in the market and exercising the right to favor its citizens over others." *Id.* at 810.

This case bears a striking resemblance to *Alexandria Scrap*. Alaska, like Maryland, has participated in the market itself and has not sought to regulate the market generally. Alaska's entry into the market has inured to the benefit of its local wood processing industry just as Maryland's entry into the market inured to the benefit of its local scrap processing industry. Finally, and most significantly, Alaska's entry into the market may be viewed as precisely the same type of subsidy to local interests that the Court found unobjectionable in *Alexandria Scrap*.

When Alaska requires that purchasers of its timber process it in-state, it subsidizes local timber processing. The amount of the subsidy is roughly equal to the difference between the price the timber would fetch in the absence of such a requirement and the amount the state actually receives, an amount that may be substantial, as the facts surrounding the 1978 waiver of the primary manufacturing requirement for Icy Cape No. 1 show. See *Kenai Lumber Co., Inc. v. LeResche*, 646 P.2d 215, 216-217 (Alaska 1982). Nothing in the Commerce Clause inhibits the state's "power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Alexandria Scrap*, 426 U.S. at 816. (Stevens, J., concurring). Alaska has done no more than choose to receive part of its consideration for its timber in

the form of a commitment to develop local industry rather than in cash.¹⁹

The Court's decision in *Reeves* made it clear that the Commerce Clause imposes no limitation on Alaska's power to choose the terms on which it will sell its timber. In *Reeves*, the Court held that the Commerce Clause had no application to South Dakota's policy of supplying all South Dakota customers first when it sold cement from a state owned cement plant. The Court reaffirmed that "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." 447 U.S. at 436. The Court observed that "[r]estraint in this area is also counseled by considerations of state sovereignty, the role of each state "as guardian and trustee for its people," and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.* at 438-39 (citations and footnotes omitted). Finally, the Court noted that

the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

Id.

The concerns motivating the Court's decision in *Reeves* similarly counsel judicial restraint here. First, it is plain that

19. The state does not monopolize the source of timber either, leaving purchasers the option to buy timber from other sellers in Alaska who will sell without processing requirements. In 1980, two-thirds of Alaska's exports were attributable to round log sales from privately held Native lands in southeastern Alaska. *Prohibit Export of Unprocessed Timber: Hearings Before the Subcommittee on Forest, Family Farms and Energy of the House Committee on Agriculture*, 97th Cong., 1st Sess. 7 (1981). See also Pacific Rim Amici Curiae Brief, 7, asserting private lands account for 70% of all round log exports from Oregon, Idaho, California, and Alaska.

Alaska, like South Dakota, is acting as a participant in the market and not as a regulator of it. Alaska has entered the market to sell its timber just as South Dakota entered the market to sell its cement. Alaska has specified the terms and conditions on which it will sell its timber, including the requirement that purchasers initially process it in-state, just as South Dakota specified the terms and conditions on which it would sell its cement, although South Dakota went further and preferred purchasers who were residents of the state. While in *Reeves* South Dakota's action cut off the complaining purchaser from its principal source of supply for 20 years, forcing 76% production cuts, Alaska sought to do just the opposite by entering the market to *add* to the supply so purchasers could *increase* production and survive. See *id.* 447 U.S. at 432-33.

Second, it is apparent that Alaska's sovereign interest in developing its local timber industry by providing its processors with a supply of timber is no less worthy of constitutional protection than South Dakota's sovereign interest in providing its residents with a supply of cement. "Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." *Id.* at 442.

Third, when the state enters the market to buy or sell, its actions are ordinarily subject to the constraints of the antitrust laws and other federal restraints on private market conduct. See, e.g., *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, 103 S.Ct. 1011 (1983). It is only fair, as the Court pointed out in *Reeves*, "that when acting as proprietors, States should similarly share [with private market participants] existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." 447 U.S. at 438. This principle of evenhandedness suggests that the states should not be whipsawed between the antitrust laws and the negative restraints of the Commerce Clause when they enter the market to buy or sell.

Finally, the competing considerations in this case are at least as "subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis," *id.* at 439, as those that have induced the Court in analogous circumstances to leave the adjustment of interests to Congress. Alaska's geographical isolation, its virtually nonexistent economic infrastructure, its chronic unemployment,²⁰ and the unusually large role that the state government must inevitably shoulder in furthering the development of its private sector are just a few of the factors that must be taken into account in making such an adjustment. Furthermore, the long standing federal concern and involvement with Alaska's forest industry development make judicial intrusion into these matters particularly inappropriate.

The Court's recent decision in *White* lends further support to the conclusion that Alaska's primary manufacturing requirement does not implicate the Commerce Clause. In *White*, the Court held that the City of Boston was acting as a market participant, not subject to Commerce Clause restrictions, when it required that all construction projects be performed by a work force consisting of at least half Boston residents. The Court rejected the argument that the Boston local hire requirement violated the Commerce Clause because it reached beyond the immediate parties employed by the city and regulated contracts between public contractors and their subcontractors. The Court declared that the "Commerce Clause does not require the city to stop

20. In 1980, Alaska's unemployment rate was 9.4%, behind only Michigan's 12.6%, and Indiana's 9.6%, and over two percentage points higher than the national average of 7.1%: U.S. Bureau of Census, *Statistical Abstract of the United States: 1981* (102d ed.), 392-93. By comparison, Japan, with some 20,000 timber mills, Pacific Rim Amici Curiae Brief, 5, and the destination of most Alaska timber exports, had a 2.0% unemployment rate in 1980. *Statistical Abstract* at 882.

According to *Public Timber Export Control: Hearings Before The Subcommittee On Public Lands Of The Committee On Interior and Insular Affairs, House Of Representatives, On H.R. 5544 And 6820, 94th Cong., 1st Sess. 31* (1975), domestic processing creates two additional jobs to every job involved in log exporting. See also *Kerr Study*, CR. 4, Ex. 11, at 33.

at the boundary of formal privity of contract," 103 S.Ct. at 1046 n.7, and found the restraint acceptable because it covered "a discrete, identifiable class of economic activity in which the city is a major participant." *Id.*

After *White*, Alaska's primary manufacturing requirement is, *a fortiori*, invulnerable to Commerce Clause challenge. Alaska's role in this case is that of a seller of timber, pure and simple. In offering state owned timber for sale on the condition that the purchaser perform primary manufacture in the state, Alaska is not regulating contracts for the resale of timber or regulating the buying and selling of privately owned timber. Alaska's requirement also "covers a discrete, identifiable class of economic activity in which the [state] is a major participant," - to wit, the sales of its own timber. *Id.* And, Alaska's primary manufacture requirement stops at the boundary of formal privity of contract. Its contractual requirement applies only to the immediate purchaser of its timber - requiring such purchaser to initially process the timber in-state. *Cf. White.*

B. The Fact That This Case Involves A Natural Resource Does Not Remove It From The Market Participant Doctrine.

Both South-Central and the Solicitor General argue that the freedom from Commerce Clause restraints that the states enjoy when they act as market participants is inapplicable to this case because it involves a natural resource. Brief, 36-37; U.S. Brief, 21. They seize on language in the Court's opinion in *Reeves* which noted that the case involved cement, a man-made resource, 447 U.S. at 443-444, and then suggest that the Court intended to limit the market participant rule only to man-made resources. Such an inference is wholly unwarranted for a number of reasons.

First, the purported predicate for the distinction, that natural resources are adventitiously distributed and, unlike man-made resources, involve no investment, foresight, or risk by the state is unfounded - at least in this case. Alaska's concern with and planning for the management, growth, and protection of its forest resources in terms of time, energy,

and tax dollars dwarfs any comparable investment that South Dakota could conceivably have made in a single cement plant. In 1980, Alaska spent over \$4,690,700 for forest management, forest fire protection, forestry research and related purposes, excluding the special appropriation for Icy Cape No. 2.²¹ In 1981, 1982, and 1983, the equivalent figures were over \$7,607,000, \$7,995,000 and \$9,667,000.²² In short, any effort to distinguish man-made from natural resources on the ground that they do not involve a substantial investment by the state is, at least on the facts of this case, a spurious one.

Second, there is no basis in sound constitutional analysis for distinguishing natural resources from other resources owned by the state.²³ If the state's freedom from Commerce Clause restraint in disposing of state owned property depends on the extent of the state taxpayers' investment in the property, then the appropriate rule would be one that looked to the extent of that investment in applying it. The state may acquire natural resources through gift or grant, exchange or purchase, eminent domain or escheat; it may spend considerable sums in managing such resources; and, in the case of timber or farm products, it may create the resources by planting and cultivating them. It would be an odd rule of constitutional law that denied the state's freedom to dispose of such resources as it wished yet permitted the

21. 1980 Alaska Sess. Laws, ch. 120, § 51, at 39, lines 5-9; ch. 6, § 1, at 3; and ch. 50 § 145.

22. 1981 Alaska Sess. Laws, ch. 82, § 28, at 54-55, lines 26, 4-7; 1982 Alaska Sess. Laws, ch. 101, § 79, at 45, lines 14-17; 1983 Alaska Sess. Laws, ch. 107, § 32, at 31, lines 5-8.

23. South-Central confuses matters by relying on Commerce Clause cases where this Court dealt with "state attempts to regulate natural resources which the state owns" only in the sense it has a regulatory interest in them, but does not "own" in the conventional sense of the word. See *Hughes v. Oklahoma*, 441 U.S. 322, 327-36, 341 (1979). One can easily distinguish as well any case South-Central cites in which the challenged state action had reached beyond state owned goods to regulate privately owned goods.

state to discriminate freely with respect to a manufacturing facility gratuitously conveyed to it by some benefactor.

Finally, considerations of state sovereignty suggest that natural resources should be treated no differently from other state owned property for Commerce Clause purposes:

To preclude the States from preferring in-state interests in the distribution of state natural resources would deprive the States of an important attribute of their separate existence as independent political units in the federal system. The denial to the States of the power to provide for their residents as such would undermine the relationship between the States and their residents. Moreover, forbidding the States from preferring their own in the distribution of their resources would introduce into the federal system an unsettling asymmetry between the respective obligations the resident and nonresident owe to the State and the benefits they enjoy there. Whether it would be good national policy to deny the States the power to favor in-state interests in this context and whether Congress in pursuit of such policy could legislate to that end are, of course, different questions. The only question here is whether the Commerce Clause by its own force withdraws this power from the States. While the Commerce Clause may have been designed to create a national common market, it would take more than a "great silence" to sever the special relationship between a State and its in-state residents and businesses.

W. Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 77-78.

C. Alaska's In-State Primary Manufacturing Requirement Does Not Impermissibly Reach Beyond The Immediate Parties With Which The State Transacts Business.

Both South-Central and the Solicitor General contend that Alaska's in-state primary manufacturing requirement impermissibly reaches beyond the immediate parties with whom the state is dealing and thereby makes the state a regulator of, rather than a participant in, the market. Brief, 37-38; U.S. Brief, 20-21. The contention cannot be squared with either the Court's decision in *White* or the facts of this

case. The Court made it clear in *White* that *even if* a state's conditioning of the disposition of its resources extended beyond the immediate parties, it would not necessarily deprive the state of its Commerce Clause immunity. 103 S.Ct. at 1046. The only question was whether the state action "covers a discrete, identifiable class of economic activity in which the city is a major participant." *Id.* Alaska's primary manufacturing requirement plainly covers such an identifiable class of activity - sales of its own timber.

It is true that the Court in *White* went on to note that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Id.* at 1046 n.7. The Solicitor General, attempting to distinguish *White*, claims that "timber processors cannot be characterized, even in an informal sense, as, 'working' for the State." U.S. Brief, 20. The claim falters on two counts. First, it is clear that the Court in *White* referred to the city's role as an indirect employer of those affected by the order as an illustration of the type of "participation" in a "discrete class of economic activity" that would preserve the city's Commerce Clause immunity. Alaska's requirement applies to a different but no less discrete class of economic activity in which it is a major participant. Second, Alaska's requirement does not apply to timber processors. It applies only to purchasers who, as a condition of the purchase, agree to have the timber processed in-state. The indirect effect, if any, on "downstream" operations is certainly no more substantial than the direct "downstream" impact in *White*.²⁴

24. South-Central claims Alaska is attempting to ban export of a product it no longer owns because title passes when the timber is "paid for, cut and scaled." Brief, 41 and n.3. The record, however, is bare of evidence that payment would be made and title would pass before primary manufacturing would occur for a group of logs. See Contract §§ 11, 12, 49 at J.A. 64a, 79a. In any event, passage of title is subject to the primary manufacturing requirement by regulation as well as by contract. Alaska Admin. Code tit. 11 § 76.080 (amended 1982). This South-Central theory is self-defeating, since under it a state would only need hold "title" longer in order to fall within the market participant rule. Finally, the Court's interpretation of the Commerce Clause should not depend on the vagaries of contract law.

Finally, South-Central and the Solicitor General's claim of support in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), Brief, 38-39, U.S. Brief, 21, is ironic, since it is a case at best illustrative of what this case is *not* about. In *Hicklin*, the Court struck down under the Privileges and Immunities Clause an Alaska statute requiring that residents be preferred over nonresidents with regard to "all employment which is a result of oil and gas leases, easements, leases or rights-of-way permits for oil and gas pipeline purposes ... to which the state is a party." Alaska Stat. § 38.40.050(a) (1977), *quoted at* 437 U.S. at 528. Emphasizing the virtually unlimited reach of the statute, extending to employers who have no connection whatsoever with the State's oil and gas, perform no work on State land, have no contractual relationship with the State, and receive no payment from the State," *id.* at 530, the Court concluded that Alaska's ownership of oil and gas was an "insufficient justification" (*id.* at 531) for forcing "virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents." *Id.* The Court had no trouble distinguishing such a pervasive and all encompassing restriction from the more limited restraint at issue in *White*. See *White*, 103 S.Ct. at 1047. The Alaska hire law reached deeply into the private market, while, in contrast, Alaska's limited in-state manufacturing requirement applies only to state owned timber.²⁵

D. Alaska's Primary Manufacturing Requirement Imposes No Special Burden On Commerce So As To Remove It From The Market Participant Doctrine.

South-Central and the Solicitor General raise a number of claims regarding the alleged burden that Alaska's primary manufacturing requirement has on commerce, and they rely

25. It is worth noting that *Hicklin*, though rejecting the overly broad restraint Alaska had imposed on the basis of its ownership of oil and gas, made it clear that such ownership does permit the states to favor local interests in the disposition of their natural resources. 437 U.S. at 528-532. See also Hellerstein, *supra*, 1979 Sup. Ct. Rev. at 79.

upon these allegations as a basis for subjecting the requirement to Commerce Clause review. Brief, 40-43; U.S. Brief, 21-22.

First of all, it should be noted that South-Central, the Solicitor General, and Amici Curiae Pacific Rim all agree that since the Jones Act, 46 U.S.C. § 883 (Supp. V 1981), makes shipment of Alaska timber to the contiguous 48 states uneconomic, there is no interstate, as opposed to foreign, market for Alaska timber. Petition for Certiorari Brief, 3 n.2; Brief, 14 n.14; U.S. Brief, 24; Pacific Rim Brief, 5 n.11. This is the same conclusion reached by a U.S. Senate Committee. Brief, 14 n.14. Since there is no interstate market, *a fortiori*, there can be no interstate burden, explaining the sudden South-Central briefing of "foreign" commerce on *certiorari*.

Second, South-Central's claim that the market participant rule is inapplicable because the primary economic impact of Alaska's primary manufacturing requirement falls on out-of-state consumers, Brief, 40, is irrelevant and is not supported by the facts. As the Court pointed out in *White*, "impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause." 103 S.Ct. at 1046. In any event, it is plain that any burden of Alaska's in-state manufacturing requirement is borne by Alaskans, not by out-of-state consumers. Alaska does not control the price of timber. If it wishes to insist on a primary manufacturing requirement which entails higher costs for the purchaser of its timber, it must reduce its price correspondingly, in effect paying for in-state processing. *Kerr Study*, CR. 4, Ex. 11, at 49. It is Alaska residents who forego an immediate increase in revenues the state would receive in the absence of such a requirement.

Third, the suggestion that the state has burdened the market rather than created a market by a state financed subsidy program is likewise untenable on its face. Brief, 42. The market for Alaska timber exists only because Alaska

has chosen to sell it. Alaska could eliminate the market tomorrow if it chose not to sell and could, of course, go into the business of processing timber in a state owned processing plant analogous to the state owned cement plant in *Reeves*, giving preference in hiring as in *White* to resident workers. The Commerce Clause was not meant to be used to penalize a state for taking the less drastic step of inducing the private sector to aid its industrial development, or for supplying resources to assist a floundering industry.

Fourth, South-Central and the Solicitor General's argument that Alaska's primary manufacturing requirement imposes a burden on foreign commerce and that this somehow makes the market participant doctrine inapplicable is unwarranted in theory, lacks any foundation in the record, and is newly raised in this Court. At the outset, the assertion that the Commerce Clause applies to a state's participation in the foreign but not the domestic market cannot be reconciled with the underlying justification for the market participant rule. The state is immune from Commerce Clause scrutiny because it is acting substantially like any other trader and is not engaging in the governmental regulations to which the Clause has traditionally been applied. Such a fundamental distinction may not be ignored merely because the state may be selling to a foreign purchaser or buying from a foreign seller. As the Court noted in *White*, the question of burden comes into play only *after* it is determined that the state is acting as a market regulator rather than a market participant. 103 S.Ct. at 1046. There is nothing in that observation which differentiates foreign from domestic burdens.

Furthermore, there is no evidence in the record that foreign commerce is in any way burdened by Alaska's primary manufacturing requirement. There is no evidence of record that Japanese consumers, the principal market target for Alaska timber purchasers, rejected Icy Cape No. 1 timber processed in Alaska, or otherwise will not purchase processed timber. There is, therefore, no warrant for the allegation that Alaska's primary manufacturing burdens the flow of commerce abroad. Finally, although South-Central

briefly alluded to the phrase "foreign commerce" in the proceedings below, there was virtually no argument or briefing on the issue in either the district court or the court of appeals,²⁶ and neither court addressed the claim on the merits in its opinion. It is only in its Petition for Certiorari Brief, 16-19, that South-Central suddenly identified this issue, too late for creation of a record that allows for adequate judicial review. If the Court believes that this issue merits further consideration, the appropriate course would be to remand the case to the district court to allow the parties to develop an adequate record. This is the course that the Solicitor General has recommended. See Brief of United States in Support of Petition for Certiorari, 5, 11; U.S. Brief, 16.

III. EVEN IF ALASKA'S IN-STATE MANUFACTURING REQUIREMENT WERE SUBJECT TO SCRUTINY UNDER TRADITIONAL COMMERCE CLAUSE CRITERIA, IT WOULD NOT VIOLATE THOSE CRITERIA GIVEN THE STRONG INDICIA OF CONGRESSIONAL APPROVAL.

It is well settled that in delineating the implied limitations that the Commerce Clause imposes on state legislation, the Court is engaged in a delicate balancing of state and national interests. If this Court were to determine that Alaska's in-state manufacturing requirement were subject to the negative implications of the Commerce Clause, the Court would then have to balance the competing demands of national economic unity and legitimate state policy which that requirement might implicate. In recent years, the Court has consistently under-taken that task in light of the well known and often used formulation articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

Although the criteria for determining validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be

26. The sole South-Central discussion of foreign commerce was in scant remarks in its summary judgment papers, CR. 51, at 13, quoted nearly verbatim in an equally perfunctory discussion in the court of appeals, *Appellee Brief*, at 28.

phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

Alaska's primary manufacturing requirement is unobjectionable under these criteria.

First, Alaska's primary manufacturing requirement applies evenhandedly. It applies to all purchasers of state owned timber, regardless of their domestic, interstate, or foreign origin or connections and regardless of the ultimate destination of the timber.²⁷ Second, the requirement effectuates a legitimate national and local interest, the development of Alaska's timber processing industry. Third, whatever burden the requirement allegedly imposes on foreign commerce, it is of such insignificance that it may not warrant Commerce Clause scrutiny as an initial matter. The state, after all, is not a monopoly owner of timber but is only one seller in an Alaska timber market dominated by private firms. See n.19, *supra*. The terms of its contract with a particular purchaser hardly rise to the level of a "burden"

27. According to the *Affidavit* of South-Central's operations manager Clyde Tanaka, at least three timber companies with milling capacity in Alaska were potential competitors at Icy Cape No. 2, Kenai Lumber Co., Inc., Schnable Lumber Co., and Alaska Lumber and Pulp Co. CR. 3, at 405. South-Central could have subcontracted milling to one of these. J.A. 8a. Kenai Lumber Co., Inc. is an Alaska corporation, and is a wholly owned subsidiary of Louisiana-Pacific Corp., a Delaware corporation with a headquarters office in Portland, Oregon. Standard & Poor's Corporation, *Standard Corporation Descriptions* (1983), 3564. Alaska Lumber and Pulp Co. was, in 1980 at least, a Japanese owned company. *Kerr Study*, CR. 4, Ex. 11, at 16-17.

on commerce, especially when there is no evidence in the record that the flow of commerce is affected by such a requirement. Indeed, it is a strange rule of law that would characterize as burdensome under the Commerce Clause commerce that the state itself has created to benefit those who paradoxically attack the state over the manner of the creation.

Any contention that Alaska's primary manufacturing requirement burdens commerce also runs counter to the Court's decision in *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978). In *Exxon*, the Court sustained over Commerce Clause objection a Maryland statute that forbade producers or refiners of petroleum products from owning or operating retail gasoline stations in the state. Emphasizing the fact that Maryland statutes did not affect the flow of interstate goods, *id.* at 126, the Court declared that "[c]ommerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate [company] to another." *Id.* at 127; *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). The same reasoning applies here. There is no evidence in the record that Alaska's primary manufacturing requirement decreases the flow of timber in commerce. The fact that it may favor integrated timber harvester-type manufacturers over timber harvesters without processing facilities in the state is of no more constitutional significance than the fact that Maryland's action favored nonintegrated gas retailers over retailers that were part of integrated firms. The Commerce Clause protects "the interstate market, not particular interstate firms". *Exxon*, 437 U.S. at 127. Moreover, the alleged burden on commerce in this case is in reality a self-inflicted wound. Because South-Central, once an integrated harvester-manufacturer, was unwilling to invest monies to maintain a mill operation consistent with Alaska pollution laws, *Konai Lumber Co. v. LeResche*, 646 P.2d 215, 218-19 (1982), it suddenly discovered that Alaska's in-state manufacturing requirement, of which it was the beneficiary for years, posed a burden on commerce.

The legal and factual contentions that Alaska's primary manufacturing requirement burdens foreign commerce and

that, even if it survives scrutiny under the standards for interstate commerce, it cannot withstand the more rigorous standards of review applicable to foreign commerce, Brief, 14-22, U.S. Brief, 22-26, likewise lack merit.²⁸ There is simply no evidence in the record that Alaska's primary manufacturing requirement has affected the flow of commerce abroad at all. Whatever effect it might conceivably have – the sale by one small participant in a large international market – is of insufficient magnitude to constitute a burden for purposes of the foreign Commerce Clause. Cf. *Container Corp. of America v. Franchise Tax Board*, 103 S.Ct. 2933, 2955 (1983) (no foreign affairs implications in a state tax merely because it had "foreign resonances").

Furthermore, if, as South-Central and the Solicitor General contend, the additional concern implicated by the foreign Commerce Clause is that the United States must speak with "'one voice when regulating commercial relations with foreign governments,'" *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979), quoting *Michelin Tire Corp v. Wages*, 423 U.S. 276, 285 (1976), Brief, 16, U.S. Brief, 25, that concern is fully satisfied here. The current federal statutory policy towards timber on federal land west of the 100° meridian (excepting Alaska) is to ban the export of unprocessed timber entirely. 16 U.S.C. § 616 (1974) The current federal policy inside Alaska is to prohibit unprocessed timber exports. 36 C.F.R. § 223.10(c) (1982) (Department of Agriculture); *BLM Manual*, Re. 5-101, 5425, "Local Export Stipulation LE-1" (Aug. 4, 1975), App.1 (.21B5c) (Department of Interior). Hence, Alaska's primary

28. The General Agreement on Tariff and Trade (GATT) and Trade Agreements Act of 1979 arguments are also newly identified by South-Central in this Court. Plainly, neither apply here. GATT negotiated standards requirements, consisting largely of precatory language binding only central governments, were implemented in the Trade Agreements Act of 1979, 19 U.S.C. § 2531 *et seq.* (Supp. V 1981). See generally Article, *Prospects for Implementation of the GATT Standards Agreement in the United States*, 20 Va. International Law 700, 704-711 (1980). The Act on its face does not apply to state agencies – absent Presidential action – and creates no private cause of action. 19 U.S.C. §§ 2533, 2504(d), 2501.

manufacturing requirement could not be more in harmony with the "one voice" doctrine.

Finally, and most significantly, the Court's Commerce Clause calculus - whether or not focusing on foreign commerce - must necessarily take account of the long standing federal policy towards Alaska which has approved its primary manufacturing requirement. Even if the Court should resolve the approval issue against the state, it is nevertheless apparent there is substantial evidence of implicit congressional sanction for Alaska's primary manufacturing requirement. When this federal policy is weighed in the Commerce Clause balance, as it must be, the balance tips decidedly in favor of the constitutionality of Alaska's policy.

The Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943) illustrates the point. In *Parker*, the Court considered a Commerce Clause challenge to a California statute requiring raisin producers to deliver a portion of their crop to a state marketing control agency which was authorized to control marketing in order to enhance the price of raisins. In sustaining the state law the Court declared that

[i]n comparing the relative weights of the conflicting local and national interests involved it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States and *has authorized marketing procedures, substantially like the California Program for stabilizing the marketing of agricultural products.* (Emphasis supplied).

Id. at 367. The analogy between *Parker* and the instant case could not be closer. Just as California had imposed marketing requirements that tracked similar federal legislation, so Alaska has imposed a primary manufacturing requirement that tracks similar federal regulations. And just as the Court found the impact of federal policy a critical factor in accommodating the competing interests involved, so in this case the federal government's approval of Alaska's primary manufacturing requirement inexorably leads to the

conclusion that the requirement should be sustained under the Commerce Clause.

CONCLUSION

As there is ample support for the court of appeals' decision, this Court should affirm. Should the Court decide to the contrary, and further decide that Alaska's action is not immune from Commerce Clause scrutiny under the market participant rule, nonetheless the Court should still affirm since there is no evidence of any burden on commerce, and any hypothecated burden is heavily outweighed by substantial, shared federal and state interests. Should the Court be troubled by questions concerning foreign commerce which South-Central newly raises, a remand for factual development is the only appropriate remedy.

Respectfully submitted,

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December 29, 1983

APPENDIX

**STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FORESTRY**

NOTICE OF TIMBER SALE

The State of Alaska, Division of Forestry, Southcentral District, pouch 7-005, Anchorage, Alaska, 99510, will sell, at oral auction, at 2:00 p.m. prevailing time on November 17, 1983, in the Frontier Building Conference Room, Suite 336, on the third floor of the Frontier Building, 36th and "C" Streets, Anchorage, Alaska, the following described timber:

Timber Sale SC-557 ADL 203002
Icy-Cape II

All sawlogs and utility logs designated for cutting within the following protracted sections and aliquot parts: Section 32, S 1/2 Sections 33 and 34, Township 21 South, Range 19 East, Copper River Meridian; S 1/2 Section 1, Sections 2, 3, 4, 5, 11, and 12, Township 22 South, Range 19 East, Copper River Meridian; S 1/2 Section 6, Sections 7, 8, and 9, Township 22 South, Range 20 East, Copper River Meridian. There are approximately 1,028 acres of designated timber in eight (8) cutting units. An estimated 34,610 MBF of spruce and 14,570 MBF of hemlock are included.

The timber will be offered for sale without a requirement for primary manufacture. The appraisal indicates a positive stumpage value for spruce and a negative value for hemlock. Stumpage values were adjusted on the basis of the proportional total sale volume by species resulting in appraised values of \$69.49 per thousand board feet (MBF) for spruce and \$3.00 MBF for hemlock. Minimum acceptable total stumpage value is thus \$2,405,048.90 for spruce, plus \$43,710.00 for hemlock, for a total of \$2,448,758.90. Bids for less than the appraised price per species will not be accepted. Determination of the highest bidder will be based upon the total stumpage value of both species.

The duration of the contract shall be six (6) years.

To qualify to bid, all bidders must submit a bid deposit of five percent of the appraised price either in cash, certified check, cashier's check or money order, in favor of the Alaska Department of Revenue. The bid deposit shall be submitted to the selling agent between 1:00 p.m. and 2:00 p.m., prevailing time, on November 17, 1983, at the Frontier Building Conference Room, Anchorage, Alaska. All bidders must have proof of a current Alaska Business License at the time of bidding. If a bidder is acting as an agent for an individual, partnership, corporation or other legally established firm, the bidder must submit a notarized letter attesting to that fact or a valid power-of-attorney, to the selling agent with his bid deposit.

The Division will not accept a bid submitted with any condition, qualification, or alteration of the terms as specified in this Notice of Sale, the Sale Prospectus, or the contract, or which is otherwise not in accordance with law.

The State reserves the right to waive minor technical defects in this advertisement and to reject any or all bids.

The sale and cutting and removal of timber shall be carried out under the authority of the Alaska Statutes, Sections 38.05.020 through 38.05.120; the Alaska Administrative Code, Sections 11 AAC 71.005 through 11 AAC 71.350 and Sections 11 AAC 71.900 through 11 AAC 71.910 referred to as the "Timber and Material Sale Regulations", 11 AAC 95.010 through 11 AAC 95.180 referred to as the "Forest Practices Regulations", and 11 AAC 95.400 through AAC 95.490 referred to as the "Forest Fire Protection Regulations."

A copy of the contract, the prospectus, the appraisal, and the cruise report can be obtained from the Alaska Division

of Forestry, at: Southcentral District Office, Pouch 7-005, Anchorage, Alaska 99510, telephone 276-2653; Southeast District Office, Pouch M, Juneau, Alaska 99801, telephone 465-2433; State Forester's Office, Pouch 7-005, Anchorage, Alaska 99510, telephone 276-2653; or the Northcentral District Office, 4420 Airport Way, Fairbanks, Alaska 99701, telephone 479-2243.

/s/ Joseph F. Wehrman

Joseph F. Wehrman, III, District Forester
Southcentral District
Division of Forestry
October 10, 1983

MEMORANDUM

State of Alaska

DEPARTMENT OF NATURAL
RESOURCES
DIVISION OF FORESTRY

TO: ESTHER WUNNICKE
Commissioner

FROM: JOHN L. STURGEON
State Forester

DATE: October 11, 1983

FILE NO: 3140.6

TELEPHONE NO: 265-4465

SUBJECT: Primary Manufacturing Policy
for Icy Cape #2, Decision
Memorandum #8

Statement of Issue:

Will primary manufacturing be required on the 49.2 million board foot second Icy Cape sale?

Background:

The State of Alaska has had a primary manufacture policy since statehood. In 11AAC 71.230 (a) it states that the director will, at his discretion, require that primary manufacture of timber removed under this chapter be accomplished within the state to the extent consistent with law. The State's policy has come under increasingly intensive review. In December 1981, the United States District Court for the District of Alaska held that the Alaska Statute authorizing the imposition of certain conditions on the sale of State-owned timber (primary manufacture) violates the commerce clause of the United States Constitution. On December 1, 1982, the Ninth Circuit Court of Appeals reversed the District Court's finding, thereby declaring that Alaska does have the authority to require primary manufacturing of timber harvested off its lands.

In September 1983, a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit was filed by Southcentral Timber Development, Inc., in the Supreme Court of the United States. The Solicitor General has filed, at the request of the Supreme Court, a brief as amicus curiae supporting Southcentral's request for a writ of certiorari. A writ of certiorari was granted on October 11, 1983 by the U.S. Supreme Court.

Issues:

1. The purpose of Primary Manufacturing is to encourage the development of a forest products industry in the State, which, in turn, strengthens our economy and creates long-term employment.
2. The USFS's primary manufacturing policy has been successful in creating three large mills in Southeast Alaska.
3. A logging and sawmilling operation generally creates 6.5 more person-hours of work per thousand board foot than by logging and round log exporting.
4. Local mills are assured of raw material, and jobs already in processing plants are protected.
5. A remote timber sale that is not economically feasible with primary manufacturing would not sell, and, therefore, Alaskan jobs would be lost (approximately 70 at Icy Bay).
6. Even without primary manufacturing, a portion of the timber is generally not of export quality (20-30%) and must receive some form of in-state processing.
7. Round log export of State timber will be in direct competition with private (Native corporations) timber owners in a currently limited market.
8. Primary manufacturing policy limits the options of the logging industry in marketing their products on the world market.

9. Requiring primary manufacturing substantially reduces the revenues to the State (approximately \$2,400,00 with round log export and \$216,000 with primary manufacturing.)

Sale Facts:

The Icy Cape area has some unique characteristics that affect the economics of a timber sale. These factors include: the high cost of capital improvements (bridges, camp, jetty, roads, etc.); operating on the open ocean, which makes the business very risky; and, finally, the extreme distance from a milling facility, which, of course, substantially increases transportation costs. These factors combined with poor market conditions were the major contributors to the deficient appraisal (weighted average of minus \$158.94) when calculated with primary manufacturing required. Not requiring primary manufacturing and allowing round log export resulted in positive stumpage with a weighted appraised price of \$49.54 per thousand board foot. *Options:*

1. *100% Primary Manufacturing* - Since the appraisal came to a negative value for both spruce and hemlock, the stumpage rates will be our minimums of \$5.00 for spruce and \$3.00 for hemlock per thousand board foot. This will result in a revenue return to the State of approximately \$216,480 based on the 49.2 million board feet. Two Board of Forestry members supported this option.
2. *Priority Bidding* This will allow the market place to decide between primary manufacture or export. The sale would be offered first with a stumpage rate based on the requirement of primary manufacturing. If no bids were received, it would then be reoffered with a stumpage rate based on export prices. Five Board of Forestry members supported this option.
3. *Open Market* - No primary manufacturing required with round log export allowed. Stumpage would be based on export prices and, in this case, be a positive value for both spruce and hemlock. Based on a weighted appraised price of \$49.54 per thousand board foot, the revenue return to the State will be approximately \$2,440,000. One Board of Forestry member supported this option.

Recommended Action:

Normally the State would require primary manufacturing; however, we feel Icy Cape is in a unique position. The difference between the negative and positive values in the appraisal came about because of higher towing charges and manufacturing costs associated with primary manufacturing. Assuming our appraisal is accurate, it is very questionable whether any operator could survive if primary manufacturing were required with today's market. In addition, since the U.S. Supreme Court granted a writ of certiorari, it is very likely that an injunction would be filed stopping the sale with the primary manufacturing requirement. Thus, Option No. 1 is not recommended.

Option No. 2 would allow the market place to decide the issue. If there is a market for in-state use of the timber, an operator will buy the sale; if not, it will go unsold. This option puts an extreme burden on a prospective purchaser to be able to go either way, thereby eliminating some operators from bidding. This, in addition to the reasons outlined for Option No. 1, causes us not to recommend Option No. 2.

It is recommended that we do go with Option No. 3. Besides answering the negative aspects of the other options, it will bring in more revenue over the life of the sale during the time of declining oil revenues. It is my opinion that requiring primary manufacturing for this sale will not help develop a local industry, nor would it create any significant new jobs. However, allowing round log export *will* assure that the 70+ people currently working at Icy Bay will remain employed. When primary manufacturing was required under Icy Bay#1 and after that requirement was removed, it did not change the net number of people employed. In short, requiring primary manufacturing did not create any additional or long term jobs.

The following points are those I used to make my recommendation.

1) *Market Not Limited*

Allowing round log export does not preclude an operator from selling logs instate to receive primary manufacturing. The appraisal figures in roughly 30% of the total sale volume as receiving primary manufacture - primarily the lower grades, but with 5% to 20% of the higher grades included to increase marketability.

2) *Competitive Sale*

Since the sale is appraised to be competitive, anyone in the private sector can bid on it. This gives a much larger segment of the forest products industry the opportunity to bid on the sale.

3) *Increased Revenue*

The revenue to the State by not requiring primary manufacturing will be substantially increased from \$216,000 to \$2,440,000.

4) *Jobs Are Not Lost*

The number of Alaskan jobs with or without primary manufacturing for this sale, based on past records, is the same. Requiring primary manufacturing could mean the direct loss of 70 jobs in Alaska. Requiring primary manufacturing in this case violates the basic principles which the policy of primary manufacturing are build: a) create jobs; b) build the forest products industry.

If this sale were closer to existing manufacturing facilities or had the potential to create long term jobs, my recommendation would be different. Even if it were possible, manufacturing the logs on site into cants would not create any additional or long-term jobs. Attempts to construct a manufacturing facility at Icy Bay have not proven feasible because it is located in a "pristine air quality" zone. This means that waste products could not be burned in the Icy Bay area.

5) *Integrity of DNR's Timber Program*

The Cape Yakataga area has an annual allowable cut of approximately 20 MMBF. The government in both good and poor markets has traditionally provided timber in an even flow. This has been done even during low markets. The government should not only look at revenue received but jobs provided. Delaying the sale would interrupt this supply and put an unnecessary burden on the timber industry.

6) *Protection of State's Investment*

Through Icy Bay I the State has secured many capital improvements such as the jetty, culverts, bridges, roads, camp, etc. A delay of the sale would put these capital improvements in jeopardy due to a lack of maintenance. Continuing the sale would protect the millions of dollars the State has invested.

7) *Commitment to Development of a Forest Industry Not Lessened*

This recommendation is only for this particular sale and is not a show of a lack of commitment on the DOF's part to help build the forest products industry. A unique set of circumstances leads to this decision. The next sale may very well have the requirement of primary manufacturing if these same circumstances change.

8) *Legality of Primary Manufacturing Uncertain*

The Solicitor General's Brief of September 14, 1983 stated it believed the Ninth Circuit Court was in error when it declared primary manufacturing legal for states. Given this strong recommendation, the Supreme Court has accepted the case. This casts grave doubts on the principle of primary manufacturing for states. This, in itself, is not enough to form a recommendation to allow round log export, but, with the other factors added, it must be considered in any decision on whether to require primary manufacturing or to allow round log export.

In closing let me reiterate that this recommendation is only for this particular sale, at this point in time. If market conditions improve prior to the selling of Icy Bay III, the recommendation to not require primary manufacturing would be examined very closely.

Recommend concurrence:

<u>/s/ James K. Barnett</u>	<u>10-11-83</u>
James K. Barnett, Deputy Commissioner	Date

<u>/s/ Robert D. Arnold</u>	<u>10/14/83</u>
Robert D. Arnold, Deputy Commissioner	Date

I Concur:

<u>/s/ Esther C. Wunnicke</u>	<u>Oct 17, 1983</u>
Esther C. Wunnicke, Commissioner	Date

No. 82-1608

Office - Supreme Court, U.S.

FILED

FEB 10 1984

ALEXANDER E. STEVAS.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

Petitioner,

v.

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.,*

Respondents

KENAI LUMBER CO., INC.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1608

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
v. *Petitioner,*

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.,*
Respondents

KENAI LUMBER CO., INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

Six years after losing in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the State of Alaska is now defending another exercise in "economic Balkanization" on essentially the same underlying grounds—that its ownership of natural resources gives it the right to create discriminatory economic opportunities for Alaskans. The fact that Alaska is one of the wealthiest natural resource states makes its efforts of great practical importance to the nation as a whole. Oklahoma's minnows, New Hampshire's hydropower, Arizona's melons, and Nebraska's border ground water,¹ all pale in comparison in economic terms to Alaska's timber, gas, and oil resources.

¹ See *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Alaska makes sweeping and novel Commerce Clause arguments in order to defend its in-state processing requirement for state-owned timber. On the key question of whether Congress has expressly consented to the State's action, Alaska consigns to a single footnote (see Br. 22 n.18) this Court's recent decisions in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), and *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982)—both of which involved alleged Congressional consent to the hoarding of natural resources by states. Instead, Alaska concedes that "Congress has not taken the opportunity to enact legislation that literally and explicitly declares its consent" (Br. 21), but contends that it is "a special case" that "the federal government's finely tuned Alaska policy" has singled out for special treatment under the Commerce Clause. (Br. 2, 14.) Moreover, says Alaska, in any event, this Court's long-established rule requiring express Congressional consent is itself "unwarranted." (Br. 20.)

Alaska's argument in support of its restraint under the market participant doctrine is equally sweeping—and very similar to what it argued in *Hicklin v. Orbeck*.² Thus, it says that "as a seller of its own timber Alaska . . . is free to choose the terms on which it deals with its prospective purchasers." (Br. 10.) It thereby dismisses all the "limiting principles" which have been suggested in this Court's prior market participant decisions on a variety of grounds, such as that they are "neither workable nor constitutionally based." (Br. 10.) In short, Alaska argues here, as in *Hicklin*, that what it cannot do by statute—to regulate the market in such a way as to burden commerce—it is totally free to do by contract.

² See Appellees Br. 49, *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (hereinafter *Hicklin* Br.). ("We suggest that the standard for measuring the validity of the State's exercise of its power as proprietor of certain resources is the same as that applicable to private persons making the same contracts.").

Finally, urges Alaska, even if this Court does not find that it is exempt from the Commerce Clause by reason of Congressional consent or the market participant doctrine, this Court should nevertheless conclude that its primary manufacture requirement imposes no undue burden on foreign commerce.³ In so doing, Alaska simply ignores this Court's repeatedly restated rule that in-state processing requirements are "virtually *per se* illegal"⁴ and its even more stringent standards where foreign commerce is at issue.⁵

Acceptance of Alaska's position by this Court would result in an unprecedented abandonment of the free trade policy embodied in the Commerce Clause. The doctrine of express Congressional consent would be jettisoned in favor of an indeterminate "implicit approval" test; the market participant doctrine would be expanded to allow resource-owning states to erect downstream barriers by contract; and/or the "virtually *per se*" standard of illegality applied by this Court to protectionist in-state processing schemes and state-imposed burdens on foreign commerce would be replaced with a new balancing test turning on the extent of "implicit congressional sanction." (Br. 39.) In other words, Alaska is inviting this Court to revamp totally its Commerce Clause jurisprudence. This it should not do.

³ See, e.g., Br. 38 ("Whatever effect it might conceivably have—the sale by one small participant in a large international market—is of insufficient magnitude to constitute a burden for purposes of the foreign Commerce Clause.").

⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970), citing *Toomer v. Witsell*, 334 U.S. 385 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928).

⁵ See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979); *Board of Trustees v. United States*, 289 U.S. 48, 56 (1933).

I. Alaska's Contention That "Congress Has Expressed Approval Of Alaska's In-State Primary Manufacturing Requirement With Sufficient Explicitness To Remove It From The Negative Implications Of The Commerce Clause" Is Unwarranted.

A. This Court Should Adhere to its Long-Standing Rule That Congress' Consent to State Restraints on Interstate Commerce Must Be "Expressly Stated."

Alaska's defense of the Ninth Circuit's unprecedented holding that "express authorization is not always necessary" (693 F.2d at 893; J.A. 142a), ignores this Court's recent statement that it has only

found such consent [when] Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause was 'expressly stated.'

Sporhase v. Nebraska, 458 U.S. 941, 951 (1982) (citations and footnote omitted).

Unable to meet this Court's standard, Alaska attacks the standard itself. Thus, this Court's "express consent" rule becomes "an inflexible rule of literal consent" (Br. 20), "the unbending rule of literal consent" (*id.*), and "a wooden rule of literal consent." (Br. 21-22.) This barrage of labels is supported by assertions such as, "It is not within the province of judicial power to dictate to Congress the precise manner in which congressional will must be expressed." (Br. 20.) Such an argument, for which no authority is cited, simply ignores the fact that it is the province of this Court "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and that

where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945).

This Court's rule requiring express Congressional consent places the important political questions where they

belong—in Congress. As the Solicitor General has explained,

[t]he requirement of explicit congressional approval for discriminatory state statutes is a necessary corollary to the proposition that the Commerce Clause is designed to protect unrepresented interests from parochial discrimination. It assures that the national legislative process will afford the representatives of the burdened interests a clear opportunity to voice their views.

(U.S. Br. 10-11; citations omitted.) This Court has made the same essential point.

It is . . . a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a *locality* is held free to impose them because it, *judging its own cause*, finds them in the interests of local prosperity.

H.P. Hood & Sons v. DuMond, 336 U.S. 525, 543 (1949) (citation omitted, emphasis added). By the same token, the explicit consent rule removes from the courts political questions which Alaska would thrust upon the judiciary under the “implicit approval” rubric.

Yet Alaska here would have this Court “rewrite . . . legislation based on mere speculation as to what Congress probably had in mind,” *New England Power Co. v. New Hampshire*, 455 U.S. at 343, on the ground that Congress’ “enormous legislative agenda” prevents it from getting around to the matter. (Br. 21.) This argument reflects Alaska’s basic error. Imposition of a discriminatory burden on constitutionally protected trade is a serious political question—and is doubly so where either natural resources or foreign commerce is involved. Alaska’s in-state preference scheme involves both. Surely it is not unreasonable for this Court to insist that Congress, as the political body representing all the states, *expressly* state its “intent and policy” to sustain a state scheme so facially at odds with the Commerce Clause.

B. Congress Has Not Expressly Consented to Alaska's Primary Manufacture Requirement, Nor Otherwise Approved, Sanctioned, or Authorized That Requirement.

Recognizing that Congress has not in fact expressly consented to its primary manufacture requirement, Alaska asserts that "the federal government" has nevertheless singled Alaska out for special treatment under the Commerce Clause, and that "Congressional policy . . . has affirmatively endorsed an in-state primary manufacturing requirement for timber cut from publicly owned lands in Alaska." (Br. 9.)⁶ This is not so.

As has been emphasized in the Solicitor General's brief, Alaska's Commerce Clause justification for its policy rests, not on any *Congressional* authorization,⁷ but rather on a *Forest Service* Regulation (originally adopted in 1928) which requires primary manufacturing for timber from *national* forests in Alaska. See 36 C.F.R. § 223.10(c). It is from this Regulation that this Court is asked to infer *Congressional* authorization for Alaska's policy with regard to its own timber reserves. (See Br. 22.)

Such a conclusion is especially unwarranted here where Congress' timber policy is ambiguous at best. Indeed,

⁶ Indeed, Alaska's brief has numerous references to Congress having "put its imprimatur upon state action" (Br. 9); of "Congressional policy" having "affirmatively endorsed" Alaska's primary manufacture requirement (Br. 9); of the primary manufacture requirement having been "repeatedly reaffirmed by Congress and its responsible agencies" (Br. 10); of "Congressional policy" having "sanctioned Alaska's primary manufacturing requirement" (Br. 19); of "its own in-state manufacturing requirement [having] been affirmed by Congress" (Br. 13); and of a "clear expression of congressional policy sanctioning Alaska's in-state manufacturing requirement." (Br. 14.) Yet, in a prior brief, Alaska flatly admitted that, in fact, Congress has been *silent* with regard to primary manufacturing requirements at both the federal and state levels. (Supp. Resp. Br. 5 n.2; emphasis added.)

⁷ U.S. Br. 11 ("It is undisputed that Congress has passed no law expressly authorizing Alaska's restrictions on the sale of timber from state-owned land.").

Congress has spoken only with regard to unprocessed logs from *national forests* in Alaska as elsewhere;^{*} except for one isolated instance,^{*} it has never approved export restrictions involving logs from *state-owned* lands (including those in Alaska), and, indeed, has repeatedly declined to enact legislation that would have extended export restrictions on logs from other than federally-owned lands. (See Pet. Br. 19, 30.) Furthermore, if Congress had wanted to extend the same type of primary manufacture restriction contained in the Forest Service Regulation to the lands given to the State of Alaska, it certainly knew how to do so, for it did exactly that on a limited basis with regard to some of the timber land it turned over to the Alaska natives. 43 U.S.C. § 1621(k) (1) (1976). It pointedly did not do so, however, with regard to the timberland it gave to the State of Alaska.

Alaska also relies heavily on the legislative history of the Alaska Statehood Act to support its position that it is "a special case." (Br. 2, 5, 14.) But that history, if anything, indicates that what Congress sought to do in the Statehood Act was merely to enable Alaska to re-

^{*} See Pet. Br. 28-31. Alaska points to the fact that the entire 350 million board foot quota of national forest timber allowed to be exported under the Morse Amendment, Pub. L. No. 90-554, § 401, 82 Stat. 966 (1968), was allocated to the lower 48 states, and says that that allocation is evidence of a "federal policy barring export of unprocessed logs from Alaska." (Br. 13.) Aside from the fact that Congress had included Alaska within the purview of the Morse Amendment quota and it was the Forest Service acting on its own that decided to give the entire allocation to the lower 48 states, the quota itself applied only to *national forest* lands. No intent whatever with respect to non-federal lands (whether state or private) can be gleaned from this allocation, despite Alaska's contentions to the contrary.

^{*} In 1979 Congress enacted legislation which imposed a ban on the export of unprocessed western red cedar from state-owned as well as federal lands, but Alaska is exempt from even that limited export restriction. See Export Administration Act of 1979, § 7(i), 50 U.S.C. app. § 2406(i) (Supp. V 1981); 15 C.F.R. § 377.7 (1983).

ceive full equality with the other states.¹⁰ It also indicates that Alaska's resources were to be developed "in the interests of the United States as a whole",¹¹ and that Congress was especially concerned about Alaska's history of discrimination against non-residents.¹² In sum, one searches in vain for any evidence that Congress has "singled out Alaska for unique treatment under federal timber laws" (Br. 13), let alone "the abundant evidence of Congressional support for Alaska's instate processing requirement" (Br. 19), that Alaska claims exists.¹³

¹⁰ See H.R. Rep. No. 624, 85th Cong. 1st Sess. 8 (1958); see also S. Rep. No. 1163, 85th Cong. 1st Sess. 9 (1957) ("bill does not grant any advantages over existing States"). Moreover, it is well-established that new states enter the Union on an "equal footing" with the other states, see, e.g., *United States v. Texas*, 143 U.S. 621, 634 (1892); *Esplanade v. Chicago*, 107 U.S. 678, 689 (1883), and there is nothing in the Statehood Act or its legislative history, or any other statute, that indicates that Congress intended Alaska to receive favored treatment under the Commerce Clause, and be exempt from the same Constitutional requirements that apply to the other states.

¹¹ See H.R. Rep. No. 624, 85th Cong., 1st Sess. 4 (1958); see also *id.* at 10 (bill was intended to "open up many of the resources of Alaska for the use of mankind"). Furthermore, while Alaska misleadingly cites the legislative history of the Statehood Act for the proposition that "Congress expressly intended to give the new state sufficient latitude to make use of its newly acquired timber resources to complement federal policy and generate Alaska timber processing industries" (Br. 14, emphasis in original), the material cited does not even refer to timber at all, let alone indicate Congress' "express intent" to "generate Alaska timber processing industries." It merely emphasizes that Congress intended Alaska to enter the Union as "a full and equal State, and not as a puppet of the Federal Government," and that "the extreme degree of Federal domination of Alaska's affairs" that had heretofore characterized Alaska's history was intended to be redressed under the Statehood bill provisions. H. Rep. No. 624, 85th Cong., 1st Sess. 7 (1958).

¹² See S. Rep. No. 1197, 85th Cong., 1st Sess. 16 (1957). See also *Zobel v. Williams*, 457 U.S. 55 (1982); *Mullaney v. Anderson*, 342 U.S. 415 (1952).

¹³ For example, Alaska misleadingly asserts that "Congress has consistently recognized and approved the continuing policy of re-

Nor has any federal *executive agency* "affirmatively endorsed" Alaska's primary manufacture requirement. (See Br. 12.) First and foremost, the Forest Service regulation on which Alaska relies for implicit approval of its policy applies only to the "*National Forest System Lands in Alaska*." 36 C.F.R. § 223.10(c) (emphasis added). Whatever policy the Forest Service has developed for administering the *national* forests it has been charged by Congress to manage (see 16 U.S.C. § 472a (1976); 36 C.F.R. § 200.3(b) (2) (1983)), certainly does not constitute approval for Alaska's policy with regard to its own timber resources.¹⁴

Furthermore, the Alaska primary manufacture regulation is *not* "virtually identical" to the federal regulation for National Forests. (Supp. Resp. Cert. Br. 3; see Br. 12-14.) Indeed, the very definition of "primary manufacture" used by Alaska and the Forest Service differs, as do the exemptions allowed. See Lindell, *Log Export Restrictions of the Western States and British Columbia* (U.S. Department of Agriculture 1978) (J.A. 117a.) Moreover, the factors considered in determining whether a given sale will be subject to a primary manufacturing requirement are significantly different. Alaska's standards underscore the economic protectionist purposes of the Alaska scheme,¹⁵ while those of the For-

quiring in-state manufacturing for Alaska timber for the express purpose of supporting the state's wood processing industry." (Br. 15.) The authority offered in support of this proposition, however, consists primarily of statements made by *individual* Congressmen acknowledging *Forest Service* policy with regard to timber harvested from *national* forests in Alaska.

¹⁴ Moreover, the stated purpose of the federal regulation is not broadly to "foster the development of the Alaska economy" in general (Br. 1), but rather only "to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the *National Forests* . . . which are geographically isolated from other processing facilities. . . ." 36 C.F.R. § 223.10(c) (emphasis added).

¹⁵ See, e.g., Memorandum to E. Wunnicke from J. Sturgeon, State Forester, Oct. 11, 1983 (Br. A-5); see also State of Alaska House

est Service underscore, among other things, "whether such export will . . . provide materials required to meet urgent and unusual needs of the Nation." 36 C.F.R. § 223.10(c). In short, Alaska's contention that the "Alaska primary manufacture requirement . . . allows for the same exceptions as do the federal regulations for federal land," is "directed at the same federal objective, reinforces the identical federal policy, and tracks federal implementing rules" (Br. 14), is just not so.

The situation here is also plainly different from that in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S.Ct. 1042 (1983) (on which Alaska repeatedly relies). In *White* the relevant federal regulations did more than strike "a harmonious note" (Br. at 10, quoting 103 S.Ct. at 1047); the regulations expressly directed the local authorities to do exactly what was alleged to be the Commerce Clause violation in that case.¹⁶ Here, in contrast, there is no federal regulation at all to

of Representatives Resolution No. 3 (1979) (J.A. 53a); State of Alaska Senate Resolution No. 9 (1979) (J.A. 55a); Policy Statement of Governor William Egan (1961) (J.A. 28a.).

Moreover, while the Ninth Circuit found comfort in the fact that the Icy Cape No. 2 sale was offered with the primary manufacture requirement to cushion the impact on the local economy of a temporary suspension of federal timber sales from the Tongass and Chugach National Forests (693 F.2d at 893, J.A. 6a), Alaska's imposition of the primary manufacture requirement is clearly not limited to such situations. As Alaska itself concedes, "with limited exceptions Alaska has steadfastly adhered to this [primary manufacture] requirement" (Br. 6), and "remains fully committed to its general policy of requiring in-state primary manufacture of its timber." (Br. 9; emphasis added.)

¹⁶ 103 S. Ct. at 1047 n.11. The federal regulations quoted by this Court made clear a basic mandate of "maximum feasible employment of local labor" in projects at least partially financed with federal funds. "Accordingly, every contractor or subcontractor . . . shall be required to employ in carrying out such contract work, qualified persons who regularly reside in the designated area where such project is to be located. . . ." *Id.*, quoting 13 C.F.R. § 305.54(a) (1982) (emphasis in original).

which Alaska can point that "affirmatively permits" (103 S.Ct. at 1047) Alaska to enact its own primary manufacture requirement.¹⁷

II. Contrary To Alaska's Contention, Its In-State Processing Requirement Does Not "Fall Squarely Within The Holdings And Reasoning" Of This Court's Market Participant Cases.

Alaska contends that its in-state processing requirement "falls squarely within the Court's holdings and reasoning" in *White*, *Reeves*, and *Alexandria Scrap* (Br. 23.)¹⁸ This argument misreads these decisions and ignores what is actually at issue here: a total ban on the export of a natural resource originally owned by a state but processed by others. Contrary to Alaska's contention, its entry into the market is *not* "precisely the same type of subsidy to local interests that the Court found unobjectionable in *Alexandria Scrap*" (Br. 24), for, as this Court specifically noted in that case, "Maryland ha[d] not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur." 426 U.S. at 806.¹⁹ Similarly, in *Reeves* this Court noted that "South Dakota [had not] cut off access to its own cement altogether, for the [state's] policy [did] not bar resale of South Dakota cement to out-of-state purchasers." 447 U.S. at 444 n.17.

In contrast, Alaska here has done exactly what this Court has suggested the states cannot do—prohibit the flow of a state-owned good across state lines with the

¹⁷ Similarly, in *Parker v. Brown*, 317 U.S. 341 (1943), which Alaska also relies on (Br. 39), the U.S. Secretary of Agriculture had affirmatively cooperated in promoting the state program and had aided it through substantial federal loans. Indeed, this is the ground upon which this Court distinguished *Parker* from *Hood*. See *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 537.

¹⁸ *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1982); *Reeves v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

¹⁹ This distinction was again emphasized in both the majority and the dissenting opinions in *Reeves*, 447 U.S. at 435; and 447 U.S. at 452 (Powell, J., dissenting).

sole goal of benefiting its own processing industry. Unlike the situation in *Alexandria Scrap*, Alaska's unprocessed logs do not remain in the state "in response to market forces," 426 U.S. at 809-10,²⁰ but rather in response to state "legislation that overtly blocks the flow of . . . commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).²¹

Furthermore, the basic underlying policy reasons for the market participant doctrine are not present here as they were in *Alexandria Scrap*, *Reeves*, and *White*. First, as this Court has recognized, "considerations of state sovereignty," while of substantial importance in cases involving solely interstate commerce, are not equally valid

²⁰ Furthermore, here, unlike the situation in *Alexandria Scrap*, the state has not "created a market that did not previously exist"—a market that "owes its [very] existence to a state subsidy program." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 815 (Stevens, J., concurring). While Alaska argues here as it did in *Hicklin* that it has created the market because it could choose not to sell its resources at all (see *Hicklin* Br. 48; Br. 33-34), that completely misses the point. Here there is a preexisting free market (timber processing) upon which Alaska's primary manufacture requirement operates to prevent competition from processors located out-of-state. This case, therefore, involves not "commerce which owes its existence to a state subsidy program," but rather a "state restriction on commerce that flourishes in a free market." 426 U.S. at 815 (Stevens, J., concurring). See Memorandum to E. Wunnicke from J. Sturgeon, October 11, 1983 (Br. A-5) ("Primary manufacturing policy limits the options of the logging industry in marketing their products in the world market."). In sum, there is no doubt that Alaska's primary manufacturing requirement is a "state policy designed to protect private economic interests in the State from the forces of the interstate market," not a "[policy] relating to traditional governmental functions, such as education, and subsidy programs like the one at issue in *Hughes v. Alexandria Scrap Corp.* . . ." 447 U.S. at 447 n.1 (Powell, J., dissenting).

²¹ See also *White*, 103 S. Ct. at 1049 (Blackmun, J., dissenting) ("*Alexandria Scrap* . . . permits a state to prefer its residents as direct recipients of certain subsidies" (emphasis added)); *Hughes v. Oklahoma*, 441 U.S. at 335 ("Overruling *Geer* also eliminates the anomaly that statutes imposing the most extreme burdens on interstate commerce—essentially total embargoes—were the most immune from challenge.").

when it is foreign, rather than interstate, commerce that is involved, as it is here. See *Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. at 449 n.13. See also *Reeves v. Stake*, 447 U.S. at 438 n.9.

Second, despite Alaska's apparent plea for special treatment because of what it characterizes as its "virtually nonexistent economic infrastructure," and its problem of "chronic unemployment" (Br. 27), the truth of the matter is that Alaska "has succeeded in generating a boom economy." M. Barone & G. Ujifusa, *The Almanac of American Politics 1984*, at 24 (1983). Its residents have the highest per capita income in the Union;²² pay no state income or sales taxes; and are the recipients of yearly money grants from the State made possible by the State's sale of its own natural resources (most importantly oil) which, of course, were originally purchased with federal taxpayer dollars and then given *gratis* to the State.²³ Yet it now seeks even more: the right to prohibit the export of one of its natural resources beyond its state borders for the sole purpose of promoting its own local industrial development. This surely goes far beyond what the states of Maryland and South Dakota sought to do as "guardian[s] and trustees" of their respective residents in *Alexandria Scrap* and *Reeves*.²⁴

²² See U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States*, at 290 (103d ed. 1982).

²³ Thus, the *Almanac of American Politics* (at 25-26) notes that: One problem—if it can be called that—is that Alaska has so much money. Its oil revenues allowed it to repeal its income and sales taxes; they mounted up so much that in June 1982 the state sent every resident of more than six months a check for \$1,000. (Alaska wanted to give long-time residents more than others, but the U.S. Supreme Court said no.) That money came from the Alaska Permanent Fund, set up under Governor Jay Hammond, which in early 1983 contained more than \$8 billion. . . .

See also *Zobel v. Williams*, 457 U.S. 55 (1982).

²⁴ See also *Toomer v. Witsell*, 334 U.S. 385, 409 (Frankfurter, J., concurring). Indeed, Alaska itself conceded as much in *Hicklin* (*Hicklin* Br. 29; emphasis added):

Third, Alaska's action cannot be justified as "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Reeves v. Stake*, 447 U.S. at 438-39. As Alaska itself has explained, it is not acting as would a private actor since a private actor would certainly not forego substantially higher sales prices in favor of promoting a larger social and economic goal, as Alaska contends it is doing. (See Br. 24-25.) If anything, Alaska's characterization of its export ban as a "subsidy" underscores Justice Powell's observation in *Reeves* that a state cannot automatically be equated with a private trader "since the state frequently will respond to market conditions on the basis of political rather than economic concerns," and may therefore "attempt to act as a 'market regulator' rather than a 'market participant'." 447 U.S. at 450. In other words, Alaska cannot be equated with a private entrepreneur having absolute discretion to deal with whomever it wants, on whatever terms it chooses, as Alaska claims is its right (Br. 25-26),²⁵ for the simple reason that it is not acting like any other private trader.

Moreover, Alaska here is not merely "exercising its own independent discretion as to the parties with whom it would deal" as was the case in *Alexandria Scrap* and *Reeves*²⁶ (and to a somewhat lesser extent, in *White* as

We believe that the authority to require such a preference, without erecting a barrier to any non-resident and without limiting in any way the use or distribution of a product is a necessary and proper incident of the State's authority and duty to manage its resources for the "maximum enjoyment" of its people.

²⁵ At heart, Alaska's contentions in this regard are essentially the same as those this Court firmly rejected in *Hicklin v. Orbeck*, 437 U.S. 518, 528 (1978). (See *Hicklin* Br. 12-16; 46-49.)

²⁶ Alaska contends that "the Court's decision in *Reeves* made it clear that the Commerce Clause imposes no limitation on Alaska's power to choose the terms on which it will sell its timber." (Br. 25;

well).²⁷ Alaska, quite simply, is acting as a market regulator, not a market participant. As the Solicitor General has explained:

Alaska . . . by imposing its primary manufacture requirement, is not selecting the parties to whom it wishes to sell its timber, but is instead selecting the timber *processors* with whom its purchasers must deal with respect to the processing of the purchased timber. . . . Although Alaska may be a participant in the timber market, and therefore perhaps entitled to some leeway in the selection of those to whom it

emphasis added.) This is not so, for *Reeves* did not concern any terms or conditions of sale as does Alaska's action here; it involved only the state's right to choose with *whom* it would deal. As the dissent in *White* recognized, "The simple unilateral refusals to deal the Court encountered in *Reeves* and *Alexandria Scrap* were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners." 103 S. Ct. at 1050 (Blackmun, J., dissenting). Moreover, although *United States v. Colgate*, 250 U.S. 300 (1919), affords a private trader the right unilaterally to choose with whom he will deal, it certainly does not go beyond that to allow that trader to impose on buyers any and all contractual terms and conditions he wants, regardless of their anticompetitive effect. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *United States v. Parks, Davis & Co.*, 362 U.S. 29 (1960).

²⁷ Despite Alaska's reliance on *White*, that case cannot be read to sanction any and all downstream regulation by a state. Indeed, this Court recognized in *White* that there were "limits" to the downstream conditions the states could impose (103 S. Ct. at 1046), and, as the dissent suggested, *White* may simply reflect this Court's traditional recognition of the special sovereign interest of the localities in hiring their own employees. See 103 S. Ct. at 1049 n.2, 1051-52 (Blackmun, J., dissenting); see also *National League of Cities v. Usery*, 426 U.S. 822 (1976); *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). This is also reflected in the majority opinion, where the Court noted that all those affected by the order were "in a substantial if informal sense working for the city." 103 S. Ct. at 1046 n.7. Here, in contrast, the impact of Alaska's primary manufacture requirement reaches deeply into a market, where, by no stretch of the imagination, can it be said that the timber processors are "working for the [state]" in any sense at all.

chooses to sell timber . . . the imposition of the primary manufacture requirement transforms the State into a *regulator* in the timber processing market. The instate processing requirement clearly constitutes downstream regulation, *i.e.*, an attempt to impose restrictions beyond the initial disposition of the timber.

(U.S. Br. 20-21; emphasis in original.) Thus, unlike the case in *White*, Alaska's action is not restricted to "a discrete, identifiable class of economic activity in which the city is a major participant," 103 S. Ct. at 1046 n.7, for while Alaska may be a participant in the timber market, the impact of its primary manufacture requirement is felt in another market entirely—that of timber processing. Contrary to Alaska's contention, its primary manufacture requirement reaches "deeply into the private market" (Br. 32), just as surely as did the Alaska hire statute this Court struck down in *Hicklin v. Orbeck*, 437 U.S. 518 (1978). Indeed, Alaska itself in *Hicklin* conceded as much.²⁸

Finally, and perhaps most crucially, this case, unlike *Alexandria Scrap*, *Reeves*, and *White*, involves a *natural resource*. Alaska, for obvious reasons, downplays the significance of this Court's distinction in *Reeves* between natural resources and man-made goods (447 U.S. at 444) and; indeed, contends that that distinction has "no basis in sound constitutional analysis." (Br. 29.) That, however, should come as a surprise to this Court, which

²⁸ Thus, in *Hicklin*, Alaska distinguished its local hire statute from cited Commerce Clause decisions on the ground that "Local Hire places no restrictions on the exploitation, transportation or distribution of the natural resource." (*Hicklin* Br. 26.) It then concluded that:

The State could not regulate the employment arising from the development of its resources in a manner which would interfere with interstate commerce in those resources. (Br. 26.)

We agree, yet that is precisely what Alaska has done here with its primary manufacture requirement. See Contract (J.A. 88a) ("Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska . . .").

generally "seems to have treated state actions that concern the disposition of natural resources differently from other actions that are of similar form but that concern different subject matter." Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563, 576 (1983).²⁰

Contrary to Alaska's contention (Br. 29), this distinction does make good constitutional sense. As this Court recognized in *Reeves*, natural resources, unlike manufactured goods, are merely "by happenstance" located within a particular state. 447 U.S. at 444. Although a state may expend some money in maintaining the natural resource or preparing for its sale, the basic, fundamental economic value represented by the resource is generally not due to any particular "risk, foresight or industry" by the fortunate resource-owning state, but rather the "adventitious distribution" of such resource. (See Br. 28.) Moreover, unlike the case in *Reeves* where any other state, taking its own "risk" and using its own "foresight and industry," could have established its own cement plant and entered the market to supply its own citizens' needs as did South Dakota, the same cannot be done with respect to natural resources. Either a state has been blessed with

²⁰ See *Hughes v. Oklahoma*, 441 U.S. at 335; see also *New England Power Co. v. New Hampshire*, 455 U.S. at 338; *Hicklin v. Orbeck*, 437 U.S. at 532-33; *Pennsylvania v. West Virginia*, 262 U.S. 553, 599 (1923). But cf. *Reeves v. Stake*, 447 U.S. 448-49 n.2 (Powell, J., dissenting) ("Regardless of the nature of the product the State hoards, the consumer has been denied the guarantee of the Commerce Clause that he may look to . . . free competition from every producing area in the Nation to protect him from exploitation by any, *H.P. Hood & Sons v. DuMond*, *supra*, at 539.").

Indeed, even the City of Boston in *White* explicitly recognized the distinction for "market participation" purposes between their local hire restriction, and a case involving natural resources. *White v. Massachusetts Council of Construction Employers*, Pet. Br. 16 n.46 ("The job opportunities created by public funds expended by a city on public works construction plainly cannot be equated with natural resources.").

a particular natural resource or it has not. While some states (most prominently Alaska) are resource rich,³⁰ others are resource poor, and no amount of risk taking, foresight, or industry will change that basic fact.

If Alaska's position on the market participant doctrine were accepted, it would be able to prevent the vast natural resources it owns from flowing to the other states (and in foreign commerce as well) simply by requiring by contract that all its resources be processed in-state.³¹ Thus, unlike its implied consent argument, Alaska's market participant argument is not an "Alaska only" argument. For example, under it, any oil-owning state could ban the export of its oil to other states, requiring that it first be refined in-state. A more serious and fundamental compromise of "the core purpose of the Commerce Clause" (*Reeves*, 437 U.S. at 443) can scarcely be imagined.

In sum, Alaska obviously does not subscribe to the fundamental precept that "the peoples of the several states must sink or swim together." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Instead, it seeks here, as in *Hicklin*,³² to use the ownership of its natural resources to promote its own prosperity at the expense of

³⁰ In addition to timber, Alaska has significant energy resources (oil, coal and geothermal); uranium; hardrock mineral deposits (including antimony, asbestos, barite, chromium, copper, fluorine, gold, iron, lead, mercury, molybdenum, nickel, platinum, silver, tin, titanium, tungsten and zinc); fish, and other forms of bird and wild animal life. See H. Rep. No. 97 (Pt. II), 96th Cong., 1st Sess. 97-108 (1979).

³¹ Indeed, Alaska's statutes already provide that it can impose a similar primary manufacture requirement with respect to its vast oil and gas reserves. Alaska Stat. § 38.06.070(b) (Supp. 1983). See also Alaska Admin. Code tit. 5, § 39.198 (1983) (prohibiting foreign vessels and aliens while in Alaska waters from processing fish).

³² See *Hicklin* Br. 8 ("Despite the fears of appellants that, if Local Hire is upheld, 'Balkanization' of our great Nation is imminent, we must point out that the United States is not one large state.").

others. As this Court suggested in *Reeves* (see 447 U.S. at 443), the market participant doctrine was never intended to be used in that way.

III. Alaska's Primary Manufacture Requirement Is *Per Se* Invalid.

As the Solicitor General has explained, "any restriction on log exports is clearly a matter within the exclusive province of the national government." (U.S. Br. 25-26.) In response, Alaska proposes that this Court employ in this case a modified *Pike v. Bruce Church* balancing test, which takes into account what Alaska terms the "implicit congressional sanction for Alaska's primary manufacturing requirement." (Br. 39.) With all due respect, Alaska's proposal completely misses the point.

First, even if only interstate commerce were at issue here, Alaska's primary manufacture requirement is precisely the type of protectionist state legislation to which this Court has consistently applied a "virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. at 624; see *Pike v. Bruce Church, Inc.*, 397 U.S. at 145.

Second, there can be no doubt that Alaska's primary manufacture requirement does have a direct and substantial impact on foreign commerce,³³ and is therefore subject to the even more stringent standards applied to foreign commerce. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 448-49. In sum, Alaska's protectionist primary manufacture requirement provides the "clearest example" of *per se* invalidity, *Philadelphia v. New Jersey*, 437 U.S. at 624, and no purpose would be served by remanding this case as Alaska has suggested. (Br. 35.)

³³ In 1981 alone, 53,687,000 board feet of timber were harvested from lands owned by Alaska; from 1971 to 1981, 479,799,000 board feet were so harvested. See Division of Budget and Management, Office of the Governor, 1 *Alaska Statistical Review 1982*, at 30 (1983). As Alaska concedes, "Japanese consumers are the principal market target for Alaska timber purchasers." (Br. 34.)

CONCLUSION

The judgment below should be reversed and the case remanded for reinstatement of the district court's judgment.

Respectfully submitted,

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NO. 82-1608

IN THE

Supreme Court of the United States

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner

v.

ESTHER WUNNICKE,
Commissioner of Department of Natural
Resources of the State of Alaska, et al.,
Respondents

and

KENAI LUMBER COMPANY, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE
NORTHWEST INDEPENDENT
FOREST MANUFACTURERS,
NORTH WEST TIMBER ASSOCIATION, AND
INTERNATIONAL WOODWORKERS OF AMERICA
IN SUPPORT OF STATE OF ALASKA

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NO. 80-1382

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

Petitioner,

v.

ROBERT LeRESCHÉ, COMMISSIONER OF DEPART-
MENT OF NATURAL RESOURCES OF THE STATE
OF ALASKA, et al.,

Respondents,

KENAI LUMBER CO.,

Respondent.

CONSENT OF PARTIES TO FILING OF BRIEF OF
AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Pursuant to Rule 35.2 of the Supreme Court Rules, all parties to this case hereby consent to the filing of a joint brief by the Northwest Independent Forest Manufacturers (NIFM), North West Timber Association (NWTa), and the International Woodworkers of America, as amicus curiae in support of respondents.

DATED December 13, 1983.

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INTEREST OF AMICI CURIAE

Northwest Independent Forest
Manufacturers (NIFM) and North West
Timber Association (NWTa) are nonprofit
organizations composed of manufacturers
who produce lumber, plywood, veneer, and
shakes and shingles in the Northwest.
Each member employs less than 500
employees, and most members are dependent
on public timberland for a timber supply.
International Woodworkers of America
(IWA) is a trade union representing
90,000 loggers, sawmill workers, and
other workers employed in wood manufac-
turing enterprises. (See Appendix B.)

These amici curiae are interested in
assuring that public timberlands are
managed so that they produce long-term
timber yields for the nation, long-term
survival for forest product industries,

and long-term employment in those industries. The members of these amici curiae are small businesses and their employees. Unlike the corporate giants of the forest products industry, these small businesses do not own their own timberlands. For the members of these amici curiae, the relatively small amount of timber on state-owned lands constitutes an important timber supply without which their economic existence and jobs are endangered.

State legislation requiring primary manufacture of wood products in the United States from state-owned timberlands will conserve resources for American small businesses and will result in employment of American workers. However, such state legislation has only minimal and incidental impact on interstate or foreign commerce.

II

SUMMARY OF ARGUMENT

It is not the purpose of these amici curiae to represent and reargue the case law which may be applicable to this lawsuit. Rather, in this brief in support of the State of Alaska, we will attempt to set forth briefly the economic substance to which the legal argument must be applied.

It is the position of these amici curiae that an economic analysis shows that state legislation restricting log exports has an "only incidental" effect on interstate and foreign commerce, but a significant effect on "a legitimate local public interest". Pike v. Bruce Church, 397 US 137, 142 (1970). In light of the economic substance, the legal arguments assume secondary significance.

The states, collectively, as owners and sellers of timber, constitute only

one small participant in the timber-log market. As we shall discuss, in the Pacific Coast states from which the vast majority of log exports arise, state-owned timber constitutes only a little more than 5% of all timber suitable for log export. In the Pacific Coast states, actual log exports have been about 14% of all timber suitable for export, and currently the great majority, perhaps 80% or more, has come from privately-owned timberlands.

The effect of the Alaska law requiring in-state primary manufacturing of timber from state-owned timberlands is to decrease timber available for log exports by only 0.2%. Any decrease in log exports from this small amount of state-owned timber has been and will continue to be replaced by increased log exports from privately-owned timberland. Any effect on interstate or foreign

commerce is minimal and incidental.

On the other hand, the effect upon legitimate local public interests will be great. Legislation requiring processing of logs in the United States will result in jobs and employment for local communities suffering from the continuing economic turndown in the forest products industry. And, such legislation will generate state and local government income from sales, business, and property taxes.

In summary, the economic impact of the state legislation on interstate and foreign commerce is small, but the benefit on local communities is very significant.

III

ARGUMENT

A. Minor Effect on Interstate and Foreign Commerce.

Ownership of commercial timberlands in the United States is diverse: 72% of

commercial timberland is privately owned; 22% is federally owned or managed; and only 6% is state owned. In the Pacific Coast states of Alaska, Washington, Oregon, and California, which account for most of the log exports, private ownership is less (37%) and federal ownership is greater (55%); but state ownership is only 8% of commercial timberland.^{1/}

Timber suitable for export is softwood sawtimber. If we look at the volume of softwood sawtimber currently inventoried on commercial timberlands, state ownership in the Pacific Coast states constitutes only 5.3% of the total inventory.^{1/} If we look at the volume of sawtimber actually harvested in 1972 through 1981 from timberlands in the

^{1/} U. S. Forest Service, An Analysis of the Timber Situation in the United States, 1952-2030, Appendix 3.

^{1/} See Table 1 on p. 17-18.

Pacific Coast states, state-owned sawtimber accounted for 5.6% of the harvest.^{1/} Privately-owned sawtimber (including Alaska native corporation and other Indian ownership) accounted for 54.5% of the harvest.^{4/}

Of the softwood sawtimber harvested from timberlands in the Pacific Coast states in 1972 through 1981, 13.9% was exported.^{2/} In the two states for which these amicus curiae have data, the great majority of exports are from private timberlands. In Washington, in the ten-year period 1968 to 1978, timber from state-owned timberlands constituted between 21% to 25% of exports. Since 1978, the percentage of export from

^{1/} See Table 2 on p. 19.

^{2/} See Table 2 on p. 19.

^{4/} See Tables 2 and 3 on pp. 19-20; 27,196 million board feet were exported out of a total harvest of 195,792 million board feet.

state-owned timberlands has steadily decreased to an estimated 13.8% of all exports in 1982.^{1/}

The percentage of exports from state-owned lands in Washington remained constant, and since 1978 has declined, despite the imposition of export restrictions on federal timberlands. In 1968, timber from federal lands accounted for 14.9% of total exports, but by 1978 had fallen to almost nothing. Privately-owned timber has accounted for the great majority of log exports from timberlands in Washington and currently is approximately 85%.^{2/} Likewise, in Alaska, timber from timberlands of Indian tribes makes up most of the exports from Alaska.^{3/}

^{1/} See Table 4 on p. 21.

^{2/} See Table 4 on p. 21.

^{3/} See Brief of Amici Curiae Pacific Rim Trade Association and Washington

Out of the total amount of softwood sawtimber harvested during 1972-81 in the Pacific Coast states, 39.8% was from federal lands and subject to federal export restriction. Only 1.3% of the total harvest was from state-owned land in Oregon and California subject to state primary manufacturing requirements. The remaining 58.5% of the harvest was available for export without any limitation.^{1/} As indicated above, 13.9% of the total harvest was exported.

State-owned softwood sawtimber in Alaska subject to a primary processing requirement, as a percentage of the amount of the 1972-81 harvest available for unrestricted export, was a mere 0.2%. If all state-imposed primary

^{1/} (Continued)

Citizens for World Trade in Support of Petition for Certiorari at p. 6.

^{1/} See Tables 5 and 6 on pp. 22-27.

processing requirements in the Pacific Coast states were removed, logs available for log export would be increased by only 1.5%. If, for illustration only, we assume that state-owned timber in Washington had been subject to a 50% log-export restriction, then the amount of the timber harvest available for log export would have decreased by only 2.0%.^{10/}

In summary, of the total amount of timber from Pacific Coast states which is suitable for export, 58.7% has been available for log export without any legal limitation, and 13.9% has been actually exported as logs. Of the amount exported as logs, the great majority,

^{10/} See Table 6 on p. 25-27. Legislation has been considered by the Washington State Legislature that would require domestic processing of 50% or less of timber harvested from state-owned timberlands. See Washington Bill No. SB 3293.

likely 75% or more, has come from privately-owned lands. State-owned timberlands account for only 5.6% of the total timber suitable for log export. The Alaska law requiring in-state primary processing decreases timber available for log export by a mere 0.2%, or less, since imposition is discretionary. Even assuming legislation requiring primary processing in the United States of all logs from state-owned lands in Alaska, Oregon, and California, and 50% of logs from state-owned lands in Washington, such legislation would affect only about 3.4% of the total softwood timber harvest in Pacific Coast states.

The small amount of state-owned timber which would be restricted from export as logs by state legislation can easily be replaced by increased export of logs from privately-owned timberlands. Such shift occurred when federally-owned

timberlands were removed from the export portion of the market.^{11/} Furthermore, exports are expected to decrease over the remainder of this century and into the next century.^{12/} The economic impact of state legislation on interstate and foreign commerce is minimal and clearly incidental.^{13/} Each state is but a minor market participant in the over-all timber market.

B. Substantial Effect on
Local Public Interest.

These amici curiae have supported legislation introduced in the Washington State Legislature which would require

^{11/} See Table 4 on p. 21.

^{12/} See Table 7 on p. 28.

^{13/} The Alaska legislation, considered alone, has no effect on interstate commerce. There is no interstate commerce. There is no interstate market for Alaskan timber. See Brief of Amici Curiae Pacific Rim Trade Association, et al., in Support of Petitioner, p. 5 n.11.

one half or less of logs harvested from state-owned timberlands to be processed inside the United States. The economic benefit on local areas in the Northwest would be significant. In its report to the Washington State Legislature (see Appendix A), NIFM estimates that such legislation would result in approximately 1,500 direct and indirect jobs in local communities hard hit by the deep and continuing recession in the forest products industry. Additionally, such legislation would generate an estimated \$1,078,000 annually in state and local sales taxes; \$506,000 annually in state and local business and occupation taxes; and \$630,000 annually in property taxes. In addition, new mill construction would generate an estimated one-time tax revenue of \$1,680,000.^{14/}

^{14/} See Appendix A.

3

CONCLUSION

In this brief we have focused upon economic reality and have left the parties to debate the law. The economic reality is that state primary manufacturing requirements for timber from state-owned lands has little effect on interstate or foreign commerce. The economic effect of the Alaska State legislation under scrutiny in this case, will be to decrease timber available for log export by a mere 0.2%. The maximum effect of existing or proposed legislation in all Pacific Coast states would be limited to 3.4% of the total softwood timber harvest. These small effects can easily be offset by increased log exports from privately-owned timberland. On the other hand, the economic reality is that local communities will benefit

significantly from increased employment and increased tax revenues.

Balancing the economic realities, "the burden imposed on [interstate and foreign commerce] is clearly [not] excessive in relation to the putative local benefits" and, therefore, the Alaska State legislation should "be upheld". Pike v. Bruce Church, supra, 397 US at 142. The judgment of the Court of Appeals should be upheld.

DATED: December 27, 1983.

Respectfully submitted,

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TABLE 1

**SOFTWOOD SAWTIMBER ON COMMERCIAL TIMBERLANDS
IN PACIFIC COAST STATES BY OWNERSHIP CLASS
(in million board feet International 1/4 scale)**

	<u>Private & Native</u>	<u>Federal & Other Public</u>	<u>Indian</u>	<u>State</u>	<u>TOTAL</u>	<u>% State</u>
Alaska	32,118*	156,162	2,000*	^{1/} 23,000	^{1/} 213,280	10.8
California	91,280	160,234	2,000	^{1/} 2,080	255,594	0.8
Oregon	88,775	313,992	5,000	^{1/} 6,419	414,186	1.5
Washington	<u>111,766</u>	<u>160,034</u>	<u>10,000</u>	^{1/} <u>31,500</u>	<u>313,300</u>	<u>10.1</u>
TOTAL	323,939	790,422	19,000	62,999	1,196,360	5.3

Source: USDA, Forest Service; Forest Statistics of the U.S.,
1977 "Indian" interpolated from Tables 2 and 13.

TABLE 1 (Continued)

-
- 1/ USDA, Forest Service PNW Exp. Sta. - Alaska Forest Inventory & Analysis, May 1983 (estimate of eventual conveyance to state and natives).
- 1/ State of California, Department of Forestry, Timber Inventory 1979.
- 1/ State of Oregon, Department of Forestry, Inventory & Analysis Section, 1980 Timber Inventory.
- 1/ State of Washington; Department of Natural Resources, Division of Management Services, Timber Inventory, 1981.
- * In 1980, two-thirds of Alaska's exports were attributable to round log sales from privately-held native lands in Southeastern Alaska. Source: Prohibit Export of Unprocessed Timber; Hearings before the Subcommittee on Forest, Family Farms and Energy of the House Committee on Agriculture, 97th Congress, p. 7 (1981).

TABLE 2

SOFTWOOD TIMBER HARVESTED FROM PACIFIC COAST STATES 1972-81
BY OWNERSHIP
(in million board feet, Scribner scale)

	<u>Private & Native</u>	<u>Federal & Other Public</u>	<u>Indian</u>	<u>State</u>	<u>TOTAL</u>	<u>% State</u>
Alaska	238 ^{1/}	4,714	77	437	5,466	8.0
California	25,405	19,463	421	302	45,591	0.7
Oregon	34,877	40,839	964	2,210	78,890	2.8
Washington	<u>40,501</u>	<u>13,005</u>	<u>4,286</u>	<u>8,053</u>	<u>65,845</u>	<u>12.2</u>
TOTAL	101,021	78,021	5,748	11,002	195,792	5.6
% of Total	51.6%	39.8%	2.9%	5.6%	100%	

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Source: F. Ruderman, Production, Prices, Employment & Trade in Northwest, 2nd and 3rd Qtr. 1982, Department of Agriculture, Forest Service.

^{1/} Alaska National Interest Lands Conservation Act (ANILCA); Timber Supply and Demand Report 1982, Department of Agriculture, Forest Service (Data 1980 and 1981 only--prior harvest unavailable, believed minimal).

TABLE 3

SOFTWOOD LOG EXPORTS FROM PACIFIC COAST STATES 1972-81
(in million board feet, Scribner scale)

	<u>Alaska</u>	<u>California</u>	<u>Oregon</u>	<u>Washington</u>	<u>TOTAL</u>
1972	66	78	508	2,110	2,762
1973	72	105	484	2,114	2,775
1974	35	78	452	1,730	2,295
1975	29	87	562	1,726	2,404
1976	26	112	545	2,191	2,874
1977	52	72	553	2,003	2,680
1978	68	74	606	2,241	2,989
1979	129	66	618	2,616	3,429
1980	161	33	546	2,086	2,826
1981	<u>149</u>	<u>26</u>	<u>455</u>	<u>1,532</u>	<u>2,162</u>
TOTAL	787	731	5,329	20,349	27,196
% Total	2.9%	2.7%	19.6%	74.8%	100.0%

Source: F. Ruderman, Production, Prices, Employment & Trade in Northwest, 3rd Quarter, 1982, Department of Agriculture, Forest Service.

TABLE 4

SOFTWOOD LOG EXPORTS FROM NATIONAL FOREST,
STATE AND OTHER LANDS IN WASHINGTON STATE 1968-82
(in million board feet)

Year	National Forest		State		All other Owners		TOTAL	
	Volume	%	Volume	%	Volume	%	Volume	%
1968	184	14.9	259	21.0	791	64.1	1234	100.0
1970	148	8.7	387	22.8	1163	68.5	1698	100.0
1972	107	5.5	494	25.3	1355	69.3	1956	100.0
1974	63	3.9	348	21.6	1201	74.5	1612	100.0
1976	50	2.8	436	24.5	1297	72.7	1783	100.0
1978	9	0.3	602	23.3	1968	76.3	2579	100.0
1980	5	0.2	419	18.2	1884	81.6	2308	100.0
1982 ^{1/}	6	0.3	295	13.8	1833	85.9	2134	100.0

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Source: Washington Mill Survey, Washington State Department of Natural Resources, December 1981.

^{1/} Washington Mill Survey, Washington State Department of Natural Resources unpublished, estimated publication date, April, 1984.

TABLE 5
COMPARISON OF LOG EXPORT

Geographic Area	Land Affected	General Limitations	Exemptions
All areas west of 100th meridian in contiguous 48 states	National Forests	No export of unprocessed National Forest timber nor substitution for timber exported from private lands.	Port Orford cedar, Alaska cedar. Sales having appraised value less than \$2,000.
All areas west of 100th meridian in contiguous 48 states	Bureau of Land Management	No export of unprocessed BLM timber nor substitution for exported private timber.	Negotiated right-of-way timber sales. Port Orford cedar. Alaska cedar.
Contiguous 48 states ¹	Public lands	No export of unprocessed Western red cedar from Federal and State lands.	Timber sales purchased prior to October, 1979

TABLE 5 (Continued)

Geographic Area	Land Affected	General Limitations	Exemptions
Alaska	National Forests	Requires primary processing in discretion of the State.	Alaska cedar, Western red cedar on long-term sale to Ketchikan Pulp Co.
Alaska	State of Alaska	Requires primary processing in discretion of the State.	With prior approval, small volumes of all species except spruce and hemlock may be exported for experimental purposes.
Oregon	State of Oregon	Export of unprocessed timber by permit only based on unavailability of domestic markets.	Port Orford cedar and timber from State Land Board Lands ¹

TABLE 5 (Continued)

Geographic Area	Land Affected	General Limitations	Exemptions
Oregon	McQuinn Strip portion of Warm Springs Reservation	Until January 1, 1992, timber from the McQuinn Strip must be designated for primary manufacture in the U.S.	None
California	State of California	No export of unprocessed timber nor substitution of State timber for timber exported from private lands.	None

Source: Gary Lindell, Log Export Restrictions of the Western States and British Columbia, Dept. of Agriculture, Forest Service PNW-63, 1978.

- 1/ Export Administration Act of 1979, U.S. Dept. of Commerce, International Trade Administration, August 1, 1982; see Pub. Law 96-72 and 15 CFR 368, et seq.
- 1/ Oregon State Land Board Ruling dated October 19, 1983.

TABLE 6

SOFTWOOD SAWTIMBER HARVEST RESTRICTED AND AVAILABLE FOR LOG EXPORTS
FROM PACIFIC COAST STATES 1972-81 BY OWNERSHIP
(in billion board feet, Scribner scale)

<u>Ownership</u>	<u>Restricted</u>	<u>Available</u>	<u>TOTAL</u>
<u>Current Situation</u>			
Private/Native		101.0	101.0
Federal	78.0		78.0
Indian		5.8	5.8
State	2.9 ^{1/}	8.1 ^{1/}	11.0
TOTAL	80.9	114.9	195.8
%	41.3%	58.7%	100.0%

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If Alaska Primary Processing
Requirement Is Removed

TOTAL	80.5	115.3	195.8
%	41.1	58.9%	100.0%
Change	-0.2%	+0.2%	

TABLE 6 (Continued)

<u>Ownership</u>	<u>Restricted</u>	<u>Available</u>	<u>TOTAL</u>
<u>If All State</u>			
<u>Limitations Are Removed</u>			
TOTAL	78.0	117.8	195.8
%	39.8	60.2%	100.0%
Change	-1.5%	+1.5%	
 <u>If Washington Law Requiring</u>			
<u>Requiring 50% Domestic</u>			
<u>Processing Becomes Effective</u>			
TOTAL	84.7	111.1	195.8
%	43.3%	56.7%	100.0%
Change	+2.0%	-2.0%	

TABLE 6 (Continued)

-
- 1/ Log exports of the Western red cedar portion of state timber harvest in California, Oregon and Washington are restricted by the Export Administration Act of 1979, (estimated 0.5 billion board feet). State laws restrict Alaska (0.4 billion board feet), California (0.3 billion board feet), Oregon (1.7 billion board feet).
- 1/ Log exports allowed on State Land Board lands in Oregon (0.4 billion board feet) and all timber in Washington, except Western red cedar (7.7 billion board feet).

Source: Table 2 and Table 5

TABLE 7

ANNUAL SOFTWOOD LOG EXPORT LEVEL PROJECTIONS
ASSUMING CURRENT POLICIES
FOR WASHINGTON AND OREGON STATE

<u>Decade</u>	<u>Billion b.f.</u>
1971-80	2.50
1981-90	2.25
1991-2000	2.05
2001-10	1.70
2011-20	1.30

28

Source: Alternative Forest Policies for the Pacific Northwest, Forest Policy Project, Study Module V, Washington State University, June 1981.

APPENDIX AIMPACTS ON ECONOMY OF PROCESSING
ADDITIONAL TIMBER IN WASHINGTON STATEA. Employment

Processing 96 million board feet more DNR [Washington State Department of Natural Resources] timber will result in a net gain of approximately 1,500 jobs.

Direct Jobs

<u>Industry</u>	<u>Million b.f.</u>	<u>Years Employment per 1 million b.f.</u>	<u>Jobs</u>
Lumber mfg.	64	6.29	403
Plywood mfg.	<u>32</u>	9.74	<u>312</u>
Total	96		715
Log Exports	96	2.36	<u>-227</u>
Net Direct Jobs			<u>448</u>

Source: USDA Forest Service, PNW-200, 1975

Indirect Jobs

For each direct job in the forest products industry, 2 indirect jobs in

service, transportation, wholesale, retail, government, etc., are created (Industrial Forestry Association, University of Washington, College of Forest Resources).

$$488 \times 2 = 976 \text{ Indirect Jobs}$$

Total Jobs:

$$488 + 976 = 1464 \text{ rounded to } \underline{1500}$$

B. Wages

Direct job wages currently paid an average of \$21,900 annually (Washington Employment Security Department--includes logging, sawmill and plywood employment). Direct wages, therefore, from these 488 jobs would amount to \$10.7 million each year.

Indirect job wages for such support jobs paid an average of \$15,400 annually (Washington Employment Security Department). Indirect wages therefore from these 976 jobs would amount to \$15.0 million each year.

C. State Sales TaxWages

Of the total annual direct and indirect wages paid of \$25.7 million, approximately 27% would be subject to state sales tax (IRS). Based on an average sales tax rate of 7.4%, the additional wages would generate revenue for state and county use of \$500,000 annually.

Processing

To produce \$46 million in wood product sales, producers will make many purchases supporting their operations, other than raw materials products and services covered by B&O tax. It is estimated that about 7% of gross revenue would be spent for items subject to sales tax. This would generate any additional \$238,000 in sales tax annually ($46,000,000 \times .07 \times .074$).

Indirect

It is estimated about 10% of the

gross revenue generated by producers will be consumed within the State of Washington through normal distribution channels. This \$4.6 million will generate \$340,000 in state sales tax annually.

Total Sales Tax — \$1,078,000.

D. B&O Taxes

Business and occupation taxes are collected from manufacturers based on the sales revenue they generate from products sold.

Lumber

64 million b.f. logs x 1.6 overrun to lumber - 102.4 million b.f.

102,400 thousand b.f. x \$221 per thousand b.f. (WWPA Index) = \$22.6 million

Plywood

32 million b.f. logs x 2.9 sq.ft./b.f. = 92.8 million sq.ft.

92,800 thousand sq.ft. x \$190 per thousand sq.ft. (A.P.A.) = \$17.6 million

Chips

96 million b.f. logs x .8 ton/thousand b.f. = 76,800 tons

$76,800 \times \$55/\text{BDT} = \4.2 million

Hoq Fuel, Bark, Savings and Sawdust

96 million b.f. logs \times 1.0 units/thousand
b.f. = 96,000 units

$96,000 \times \$17/\text{unit} = \1.6 million

Total Products \$46.0 million

B&O rate for manufacturing (not
including the surtax) .00471 is used.
The total B&O tax would be \$217,000.

Indirect B&O

The University of Washington,
College of Forest Resources, conducted
input-output studies in 1976. These
studies concluded that for each revenue
dollar received by a wood products manu-
facturer, an additional \$1.33 expenditure
is generated for their raw materials,
equipment and supplies.

$\$1.33 \times 217,000 = \$289,000$

Total B&O is \$506,000 per year

E. New Production Facilities

As timber harvest from DNR lands

changes from old growth to second growth, and with the revolutionary changes in sawmill technology, it is expected that new or replacement mills will be constructed. With the availability of an additional 96 million b.f. of logs, it is anticipated that one-half of the volume will be processed in existing sawmills and plywood plants. The remaining 48 million board feet will result in stimulating construction of two additional sawmills costing a total of \$12 million.

An expenditure of \$12 million for new or replacement mill facilities would be divided approximately 45% labor cost (\$5.4 million) and 55% material costs (\$6.6 million), most of which would come from Washington.

To determine the full extent of the impact of a one-time injection into the state's economy of \$5.4 million in wages and \$6.6 million in construction material

costs, it is necessary to recognize that these expenditures also will be "multiplied" as they circulate and recirculate through the state's economy.

Thus, the construction phase of the two new mills will result not only in the direct construction wages of \$5.4 million, but indirectly on another \$5.4 million (using a multiplier of two), and have the full effect of \$10.8 million of direct and indirect wage expenditures on the state economy. At \$20,000 annual average wage, this level of expenditure represents 540 jobs. The \$6.6 million in material costs will have the full effect of \$19.8 million of material expenditures on the state economy (using a multiplier of three). As calculated before, it would be expected that 27% of the wage expenditure, or \$2.9 million ($.27 \times \10.8 million), would be subject to state sales taxes, as would the \$19.8 million in

material expenditures. The one-time state tax revenue generated would be \$1.68 million ($\$22.7 \text{ million} \times 7.4\%$).

It is anticipated that the new mills would be constructed in F.Y. 1984 through 1987.

F. Property Tax

Mills

It is anticipated that the two new mills will go on the tax rolls in 1986 and 1988 at \$6 million each, and that the effective tax rate will be 1.5%. This will increase property tax collections \$180,000 in 1989 and beyond.

Homes and Other Business

It is estimated that the additional 1,500 long-term jobs will generate property tax improvements in homes and businesses of \$20,000 per job, or \$30 million over the next 6 years.. This will result in \$450,000 in annual property tax collection.

Source:

Fiscal Note: Washington Bill No.
SB 3293, Northwest Independent
Forest Manufacturers, submitted to
Washington State Legislature, March,
1983.

APPENDIX B

LIST OF MEMBERS OF AMICI CURIAE

Northwest Independent Forest Manufacturers

A & B Shake Mill
Allen Logging Company
G. T. Anderson Lumber Co.
Boyd Lumber Corporation
Cascade West Forest Products
Clear Shake, Inc.
Columbia Vista Corporation
Dahlstrom Lumber Company
Delson Lumber Company
Great Western Lumber Co.
Hamilton Cedar Products
H-O Lumber Products, Inc.
Hoquiam Plywood Company, Inc.
Hurn Shingle Company
Loth Lumber Co., Inc.
Manke Lumber Company
Merrill & Ring, Inc.

B-2

Miller Shingle

Mt. Baker Plywood, Inc.

North Hoquiam Shake

Pacific Highland Cedar Products

Peoples National Bank

Puget Sound Plywood, Inc.

Rosmond Bros. Lumber Co.

Seattle-Snohomish Mill Co.

Sol Duc Shake Company, Inc.

Summit Timber Company

Welco Lumber Company

North West Timber Association

Alpine Veneer, Inc.

Brazier Forest Products

Brookings Plywood Division,

South Coast Lumber Co.

Eugene F. Burrill Lumber Company

C & D Lumber Company

Clark & Powell Lumber Company

Clear Lumber Company

Cone Lumber Company
Cuddeback Lumber Company
Douglas County Lumber Company
Fort Vancouver Plywood Company
Freres Lumber Company
Herbert Lumber Company
D. R. Johnson Lumber Company
Keller Lumber Company
Lane Plywood Company
Mazama Timber Products, Inc.
The Murphy Company
North Side Lumber Company
Oregon Industrial Lumber Products, Inc.
Rosboro Lumber Company
Rough & Ready Lumber Company
Spalding & Son, Inc.
Starfire Lumber Company
Tangfeldt Wood Products
Webco Lumber, Inc.
Zip-O-Log Mills, Inc.

NOV 25 1983

No. 82-1608

**In the Supreme Court
of the United States**

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT,
INC., *Petitioner,*

v.

ESTHER WUNNICKE, Commissioner of
Department of Natural Resources of the
State of Alaska, et al., *Respondents,*

and

KENAI LUMBER COMPANY, INC., *Respondent.*

*On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

**MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE
PACIFIC RIM TRADE ASSOCIATION AND
WASHINGTON CITIZENS FOR WORLD TRADE
IN SUPPORT OF PETITIONER
SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.**

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**MOTION OF PACIFIC RIM TRADE ASSOCIATION AND
WASHINGTON CITIZENS FOR WORLD TRADE
FOR LEAVE TO APPEAR AS AMICI CURIAE
IN SUPPORT OF PETITIONER
SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.**

Pacific Rim Trade Association and Washington Citizens for World Trade, nonprofit organizations whose members include companies, labor unions and public agencies engaged in or associated with foreign commerce in the Pacific Northwest, respectfully move pursuant to Rule 36.1 of the Rules of this Court for leave to appear as *Amici Curiae* and to file the attached Brief supporting Petitioner South-Central Timber Development, Inc. Petitioner and respondent State of Alaska have consented to the filing of the brief, but intervenor Kenai Lumber Company, Inc. has not answered *Amici's* request for consent.

Members of *Amici Curiae*¹ are engaged in or associated with the export of softwood logs from Pacific Northwest ports to Japan and other markets in the Far East. Much of the timber to supply that trade is harvested from state and local government lands in the region, and that supply is threatened by "primary manufacturing" statutes in Alaska, Oregon, Idaho, and California, which require logs sold and harvested from state lands to undergo initial milling within the state or within the United States.

The court below sustained the Alaska statute on

¹ The membership of each is set forth at 1a-2a *infra*.

a theory of implied congressional consent to state restrictions on foreign trade. That decision tends to support restrictions imposed by "primary manufacturing" statutes in Oregon, Idaho and California,² and threatens the log export trade from those states as well as Alaska. Pressure has also arisen for similar legislation in Washington.³ Essential economic interests of *Amici Curiae* are thus at stake in this case.

It is appropriate for the Court to consider the views of *Amici Curiae* because the economic impact of the Court's decision in this case will be felt not only in

² The Alaska regulation is found at Pet. 19a-21a. At the time of this action, round logs underwent "primary manufacture" when they were sawed into "squares" or "cants" 12 inches on a side or less; present regulations reduce the maximum size to eight and three-quarter inches. Pet 20a.

California forbids the sale or resale of state timber to any "primary manufacturer" for use outside the United States unless it has been sawn into 4" by 12" dimensions. Cal. (Pub. Res.) Code § 4650.1 (West). Oregon requires logs removed from state or local government land to be "primarily processed in the United States," and it is a misdemeanor to purchase or sell timber from such lands for delivery outside the United States in log form. ORS 526.805-526.835. Idaho requires logs removed from state lands to be manufactured into lumber or timber products within the state. Idaho Code § 58-403.

³ The following bills introduced in the 1983 Washington Legislature would have restricted log exports: SB 3293; SB 3440; HB 202; HB 443.

The Washington Attorney General in an Opinion dated October 29, 1975, concluded that a "primary processing" bill to be proposed in that session would be "indefensible" under the commerce clause of the federal constitution. AGLO 1975 No. 88.

Alaska, but in other Northwest states where *Amici* conduct their businesses. While the Alaska log export restrictions affect a substantial amount of trade, a much greater and economically more significant amount of export trade is restricted in these other western states, which have larger state holdings and larger export trade.

The purpose of the attached brief of *Amici Curiae* is to explain to the Court the nature and scope of foreign commerce in the Northwest that will be affected by the decision in this case, and its importance to the region and to the national economy.

Respectfully submitted,

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C. Kerr & M. Wibbenmeyer, <i>Alaskan Export Policy</i> (1979)	5
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<i>Wood Use — U.S. Competitiveness & Technology</i> , Congress of the United States, Office of Technology Assessment (August, 1983)	3, 4, 6

**In the Supreme Court
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OCTOBER TERM, 1983

**SOUTH-CENTRAL TIMBER DEVELOPMENT,
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*On Writ of Certiorari to the
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**BRIEF OF AMICI CURIAE
PACIFIC RIM TRADE ASSOCIATION AND
WASHINGTON CITIZENS FOR WORLD TRADE
IN SUPPORT OF PETITIONER**

INTEREST OF AMICI CURIAE

The interest of *Amici Curiae* is set forth in the
Motion, *supra*, at i-iii.

SUMMARY OF ARGUMENT

"Primary manufacturing" statutes protect local lumber mills by requiring privately-owned logs cut from state lands to undergo initial milling in the home state or in the United States. Their principal effect is to prohibit the export of such logs in an unprocessed condition to markets in the Far East. Statutes prohibiting log exports have been enacted not only in Alaska, but also in Oregon, Idaho and California, and have been proposed in Washington. These resource-rich states contain the nation's largest stands of Douglas fir and hemlock-spruce, which constitute the bulk of log exports and command a high price in export markets.

Foreign trade in unprocessed logs is critical to the economy of the Pacific Northwest and Alaska, because Northwest producers no longer compete in domestic markets east of the Rockies, and Alaskan producers must still depend, as they always have, on the export market. The log export trade is also important to the national economy. It returns billions of dollars each year to the United States from overseas purchasers, and contributes significantly to a positive trade balance in wood products. The interests at stake in this case are important and are entitled to protection under the Commerce Clause.

ARGUMENT

1. The large export trade in unprocessed softwood logs from the Pacific Northwest to the Far East is important to the economy of the region.

The principal impact of regulations prohibiting the export of unprocessed logs is on foreign,⁴ rather than interstate commerce.

The United States ranks third among nations in the size of its forest and is the leading producer of forest products as well as the largest consumer.⁵ Foreign trade of the United States in logs and wood products runs in two directions. It consists of *imports* of softwood products from Canada, and of hardwood veneer and plywood from Asia; and *exports* of solid softwood products from the Pacific Northwest and Alaska to Japan and other countries in the Far East, and of pulp, paper and board products from the Pacific Coast and the South to all major world markets.⁶ In 1981, for the first time, American traders achieved a positive trade balance (see Tables 7, 8 at 6a, 7a *infra*). The

⁴ Scrutiny under the Commerce Clause is more rigorous when the state restraint affects foreign rather than interstate commerce. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-449 (1979); L. Tribe, *American Constitutional Law*, § 6-20, at 380 (1979).

⁵ *Wood Use — U.S. Competitiveness & Technology*, Congress of the United States, Office of Technology Assessment, (August, 1983), at 13-15, and Tables 2, 3 at 3a, 4a *infra*.

⁶ *An Analysis of the Timber Situation in the United States 1952-2030*, Department of Agriculture, Forest Service (1982) (hereafter "Analysis of the Timber Situation"), Ch. 4, at 73-103.

largest surplus is generated in the Pacific Northwest, followed by Alaska (See Table 6 at 5a *infra*).

This foreign trade in wood products has become indispensable to the region. Formerly, the principal markets for Northwest wood products were domestic, and exports were treated as an outlet for domestic surplus.⁷ Today, new technology for processing Southern pine, increased transportation costs, and competition from Canada have nearly eliminated Northwest softwood from markets east of the Rockies,⁸ forcing Northwest producers to develop foreign markets for most of their non-region sales.

Exports have filled the gap. In 1982,⁹ exports of solid wood products amounted to \$2.6 billion (see Table 8 at 7a *infra*), of which 40 percent (\$1.04 billion) was in unprocessed logs. Of that trade, over \$750,000,-

⁷ *Wood Use, supra*, at 64.

⁸ It now costs as much to ship lumber from Oregon to Denver as from Oregon to Tokyo. In 1960, the Pacific Northwest supplied over 20% of the Northeastern lumber market. Today it supplies less than 2%. Oregon Legislature, Joint Legislative Committee on Trade and Economic Development, *Final Draft — The Log Export Issue: An Analysis* (1983) (hereafter "Joint Committee Report") at 62.

⁹ In 1980, the last year for which dollar figures are available, log exports amounted to about \$85 million in Alaska, \$16 million in northern California, \$277 million in Oregon, and — significantly — \$1.034 billion in Washington, which does not restrict log exports. (F. Ruderman, *Production, Prices, Employment & Trade in Northwest Forest Industries, Second Quarter 1982*, Dept. of Agriculture, Forest Service, (1982) at 17-20).

000 consisted of softwood logs (mainly Douglas fir and hemlock-spruce). Eighty-five percent of those logs originated in the Pacific Northwest and Alaska (see Tables 6 and 7 at 5a-6a *infra*).

The principal log export customer is Japan. In 1979, exports of unprocessed logs to Japan accounted for over 80 percent of sales, virtually all destined for 20,000 family-owned Japanese mills which produce metric-size close-tolerance products for the Japanese housing market.¹⁰ In Alaska, the industry exists principally to serve the Japanese market.¹¹ Japan is also

¹⁰ See C. Kerr & M. Wibbenmeyer, *Alaskan Export Policy* at 26, 33 (1979); *Analysis of the Timber Situation*, *supra*, at 77; D. Darr, "The Impacts of International Trade on Domestic Markets," *Proceedings: The Impact of Change on the Management of Private Forest Lands in the Northwest* (Portland, Oregon, March 29-31, 1978) (hereafter "Impacts"), at 29; *Joint Committee Report*, *supra*, at 63. Significant purchases were also made by the Chinese and Koreans.

¹¹ Although Alaska contains 119 million acres of forest, which is about one-sixth of the nation's total, only 11.1 million acres are classified as commercial timberland. Of that area, 7 million acres are in coastal Alaska, which is the only portion of the state that can be economically harvested on a commercial scale. Almost all of this timber is old growth softwood which has never been harvested, and is particularly suited to the export market. Harvests from coastal Alaska increased from 14 million cubic feet in 1952 to 119 million cubic feet in 1970, and softwood sawtimber harvests during the same period rose from 99 million board feet to 754 million. *Analysis of the Timber Situation*, *supra*, at 193-196.

There is no significant interstate market for Alaskan logs or timber products due to the distance from other states and to the price supports to U.S. flagships established by the Jones Act, 46 U.S.C. § 883.

the principal export purchaser of wood products from other Ninth Circuit states, and such shipments accounted for 89 percent of such export sales in 1980.¹²

2. Douglas fir and hemlock-spruce logs are a valuable export commodity, and log export restrictions that protect local processors are a heavy burden on the nation's commerce.

Douglas fir is one of the nation's most valuable softwood species, and hemlock-spruce is another. The largest concentration of Douglas fir lies west of the crest of the Cascades in Oregon and Washington. Hemlock-spruce also grows primarily west of the crest of the Cascades, with particularly high concentrations on the western slopes of the coast ranges in Oregon and Washington, on the Olympic peninsula in Washington, and in southeastern Alaska.¹³

These forests contain timber that is highly valued in the export market, particularly Japan, and commands a premium¹⁴ which is estimated to range from 9 percent¹⁵ to over 30 percent.¹⁶ Sales of this timber make a special contribution to a balanced trade relationship.¹⁷

¹² Ruderman, *supra*, at 19.

¹³ *Analysis of the Timber Situation*, *supra*, at 123-124, 186.

¹⁴ *Wood Use*, *supra*, at 58, 183.

¹⁵ *Joint Committee Report*, *supra*, at 51, 66.

¹⁶ Industrial Forestry Association, *1976 Composite Log Sales Analysis* (1977).

¹⁷ *Wood Use*, *supra*, at 58.

3. Restrictions on exports of logs cut from state lands will have an increasing impact on the log export trade in future years.

Federal restrictions on exports of logs removed from federal lands have limited the supply of logs for the export trade, and state limitations since the 1960's in Oregon, Idaho, California, and Alaska have also affected the market. As a result, about 70 percent of all exported logs have been harvested from private lands in these states. As timber is cut from these lands, they are reforested, but in the years prior to harvest of the reforested private lands, public lands will become an important source of export logs ¹⁸. "Primary manufacturing" statutes or other restrictive legislation will thus be an increasing burden on the continued viability of the log export market.

¹⁸ *Analysis of the Timber Situation, supra*, at 131-132, 154-160, 183-187.

CONCLUSION

"Primary manufacturing" statutes are not merely a conceptual violation of the Commerce Clause; they threaten the entire log export segment of the wood products industry in precisely the way the Constitution intended to make impermissible. "Primary manufacturing" statutes are significant restraints on a large volume of foreign commerce and cannot be sustained by a process of implication from federal statutes that have no application to the states or to state timberlands.

The judgment of the Court of Appeals should be reversed.

November 25, 1983.

Respectfully submitted,

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APPENDIX

LIST OF MEMBERS OF
PACIFIC RIM TRADE ASSOCIATION
AND
WASHINGTON CITIZENS FOR WORLD TRADE

**Pacific Rim Trade
Association**

Atlas Steamship Co.,
Northwest
Brady-Hamilton Stevedore
Co.
Brusco Tow Boat Co.
Burlington Northern, Inc.
Caffal Bros. Forest
Products, Inc.
Cascade Shipping Co.
Central Dock Co.
Columbia River Bar Pilots
Coos Bay Ship Pilots
Crown Zellerbach
Corporation
Dant & Russel, Inc.
Dillingham Ship Repair
Dolphin Terminals
East Orient Timber Co.
Eureka Forest Products
Fibrex & Shipping Co., Inc.
General Steamship Corp., Ltd.
International Log Sales/
Bald Knob Land & Timber
International Longshoremen's
& Warehousemen's Union
International Shipping Co.
Jones Oregon Stevedoring
Company
Knappton Corporation
Knutson Towboat Co./
Log Storage
Koontz Machine & Welding,
Inc.

**Washington Citizens for
World Trade**

Allman Hubble Tug Boat
Company
Anderson & Middleton
Lumber
ASARCO
Norman Barnes & Co.
Burlington Northern, Inc.
Crown Zellerbach Corporation
Evans Engine & Equipment
Howard-Cooper Corporation
John Hoyne
International Longshoremen's
& Warehousemen's Union
ITT Rayonier, Inc.
Jones Washington
Stevedoring
Mayr Brothers Logging
Murray Pacific
Pacific Lumber & Shipping
Port of Anacortes
Port of Bellingham
Port of Everett
Port of Grays Harbor
Port of Longview
Port of Olympia
Port of Port Angeles
Port of Tacoma
E. R. Probyn
Roderick Timber Company
St. Regis Paper
Scott Paper
Seattle Stevedore Company
Washington Contract
Loggers Association

**Pacific Rim Trade
Association**
(Continued)

Longview Fibre Company
Niedermeyer-Martin Co.
North Bend Fabrication &
Machine Inc.
Olympic Steamship Co., Inc.
Oregon Small Woodlands
Association
Al Pierce Lumber Co.
Port of Astoria
Port of Coos Bay
Port of Portland
Riedel International, Inc.
Shaver Transportation Co.
United States Trading
Company, Inc.
Van Natta Brothers
Westbrook Exports
(Reservation Ranch)
Western Equipment Co.
of Eugene
Western Transportation Co.
Westfall Stevedore Co.
Weyerhaeuser Company
Williams, Diamond & Co.

**Washington Citizens for
World Trade**
(Continued)

Washington Farm Forestry
Association
Washington Public Ports
Association
Washington Trucking
Association
Weyerhaeuser Company

Wood Use — U.S. Competitiveness & Technology, Congress of the United States, Office of Technology Assessment (August, 1983).

Table 2. — Countries with Largest Forested Areas

	Exploitable forest area (million ha) ^a	Growing stock (million meters ³ over bark) ^c			Industrial harvest (billion ft ³) 1977
		Total	Coniferous	Broadleaved	
U.S.S.R.	389	74,710	62,000	12,710	10.0
Brazil	305	47,088	98	46,990	1.5
United States	195	20,132	12,906	7,226	11.5
Canada	191	19,645	15,571	4,074	5.1

^a Exploitable forest definitions differ by country. Some countries such as Canada have restrictive definitions that result in conservative estimates of exploitable forestland. Volume estimates for the U.S.S.R. include growing stock on some 110 million acres (44.5 million ha) considered to be unproductive forestland.

^b To convert hectares to acres, multiply by 2.471.

^c To convert cubic meters to cubic feet, multiply by 35.31.

SOURCES: United Nations Food and Agricultural Organization, *Yearbook of Forest Products, 1979* (Rome, 1981); G.M. Bonner, *Canada's Forest Inventory 1981* (Environment Canada, 1982); United Nations Environment Program /Food and Agricultural Organization, *Los Recursos Forestales de la American Tropical* (Rome, 1981); United Nations Economic Commission for Europe, *European Timber Trends and Prospects, 1950 to 2030* (Geneva, 1976); U.S. Department of Agriculture Forest Service, *An Analysis of the Timber Situation in the United States, 1952-2030* (Washington, D.C.: 1962).

Table 3. — Major World Producers of Selected Wood Products

	Industrial roundwood ^a	Sawn softwood	Sawn hardwood	Plywood	Pulpwood and chips ^a	Paper and board
United States	308	58	17	16	109	57
U.S.S.R.	278	87	12	2	38	9
Canada	156	41	—	2	39	13
Sweden	49	—	—	—	26	6
Finland	44	—	—	—	19	6
Japan	—	31	6	8	—	18
People's Republic of China ^b ...	—	13	8	—	—	5
Brazil	—	—	6	—	—	3
Korea	—	—	—	2	—	2

^aPulp production figures are in millions of metric tons. All other products are in million cubic meters.

SOURCES: FAO Yearbook, 1980; National Forest Products Association and the U.S. Foreign Agricultural Service, *Wood for the World, Today and Tomorrow*, n.d.; and M. Bayliss, L. Haas, and S. Reid, "Basically Good Production But a Weak Economy Marked 1980 Record," *Pulp and Paper* (August 1981), p. 67.

Table 6. — Solid Wood Trade Patterns, by U.S. Region, 1976

Region	Imports (millions of dollars)	Major supplier	Exports (millions of dollars)	Major customer	Trade balance (millions of dollars)
Pacific Northwest	422	Canada	1,246	Japan	824
South Atlantic	103	Far East	40	Europe	-63
Gulf	130	Far East	54	Europe	-76
North Atlantic	342	Canada	126	Europe	-216
South Pacific	82	Far East	90	Japan	8
Great Lakes	627	Canada	173	Canada	-454
North Central	230	Canada	36	Canada	-194
South Central	1	Mexico	6	Mexico	5
Alaska	1	Canada	77	Japan	76

*Excluding waste paper.

SOURCE: Sedjo and Radcliffe, *Postwar Trends in U.S. Forest Products Trade* (Washington, D.C.: Resources for the Future, 1980).

Table 7. — U.S. Exports of Solid Wood Products, 1981

Product	Quantity (thousands)	Value (thousands of dollars)	Percent of value
Logs and timber (board ft.)	2,534,224	\$1,094,716	40.76%
Hardwood	157,125	91,868	3.42
Softwood	2,377,099	1,002,848	37.34
Pulpwood (cords)	176	9,911	.037
Wood chips (short tons)	3,546	290,184	10.80
Wood waste, wood fuel	NA	12,894	0.48
Lumber and railroad ties (board ft.)	2,374,055	923,784	34.40
Hardwood lumber	381,481	243,026	9.05
Softwood lumber	1,903,809	655,544	24.41
Railroad ties	88,765	25,214	0.94
Wood-based panels	NA	354,293	13.19
Softwood plywood and veneer	NA	189,727	7.06
Other	NA	164,566	6.13
Total	—	2,685,782	100.00

SOURCE: U.S. International Trade Commission.

Table 8. — U.S. Imports of Solid Wood Products, 1982

Product	Quantity (mbf ^a)	Value (thousands of dollars)	Percent of total value
Logs and timber	117,032	\$26,430	1.2%
Hardwood	18,268	3,500	0.2
Softwood	98,764	22,930	1.0
Pulpwood (including chips)	NA	56,248	2.5
Wood waste, fuel	NA	8,446	0.4
Lumber and railroad ties	9,200,075	1,665,312	73.2
Softwood lumber	8,973,652	1,567,931	68.9
Other	226,423	97,381	4.3
Wood-based panels	NA	519,585	22.8
Hardwood veneer and plywood	NA	402,798	17.7
Other	NA	116,787	5.1
Total		<u>\$2,276,021</u>	<u>100.0%</u>

^ambf^a million board feet.

SOURCE: U.S. International Trade Commission.

7-a

No. 82-1608

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PETITIONER

v.

ESTHER WUNNICKE, COMMISSIONER OF DEPARTMENT OF
NATURAL RESOURCES OF THE STATE OF ALASKA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS
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QUESTIONS PRESENTED

1. Whether congressional consent to an Alaskan statute and regulations restricting the export of unprocessed timber cut from state-owned lands may be inferred from the existence of federal statutes and regulations imposing similar export restrictions on unprocessed timber cut from federally-owned lands.

2. Whether Alaska's restrictions on the export of unprocessed timber cut from state-owned lands are exempt from Commerce Clause scrutiny under the "market participant" doctrine.

3. Whether, in the absence of congressional consent, Alaska's restrictions on the export of unprocessed timber cut from state-owned lands constitute an impermissible burden on foreign commerce in violation of the Commerce Clause.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The principal question presented by this case is whether congressional consent to an Alaskan statute and regulations restricting the export of unprocessed timber cut from state-owned lands may be inferred from the existence of federal statutes and regulations imposing similar export restrictions on unprocessed timber cut from federally-owned lands. In response to the Court's invitation, we filed a brief at the petition stage expressing the view that this issue had been wrongly decided by the court of appeals and should be reviewed here. The United States has a significant interest in the outcome of this case because, in our submission, the court of appeals' holding that congressional authorization is not always necessary in order to validate an otherwise impermissible state burden on interstate or foreign commerce

constitutes a judicial restructuring of the constitutional allocation of power over the regulation of commerce. Furthermore, acceptance of the "implicit approval" theory would enable states to enact non-uniform and otherwise impermissible burdens on foreign commerce, resulting in unacceptable state interference with the conduct of the foreign relations of the United States.

STATEMENT

1. The State of Alaska, by statute, authorizes the State Commissioner of the Department of Natural Resources to condition the sale of timber from state-owned lands on "primary manufacture" within the State. The primary manufacture condition requires that the timber undergo certain processing in Alaska prior to being exported into interstate or foreign commerce. See Pet. App. 19a-21a.¹ The undisputed purpose of the primary manufacture requirement is to enhance local employment opportunities (see, *e.g.*, J.A. 53a, 55a); as the court of appeals noted, the primary manufacture requirement is "pointedly designed to favor [the State's] local timber processors" (*id.* at 139a).

In 1980, the State gave notice that a proposed sale of timber from state-owned lands (the "Icy Cape No. 2" sale) would be conditioned on primary manufacture in Alaska (J.A. 34a-35a). The State indicated that the condition was being imposed in order to ensure a continuing supply of timber for local processors during a period of temporary shortage of timber from federal lands (J.A. 41a).²

¹ Alaska Stat. § 38.05.115 (1982) (Pet. App. 19a) provides that the "commissioner * * * shall determine the timber and other materials to be sold, the limitations, conditions and terms of sale." Pursuant to this statutory authority, Alaska has adopted regulations (Alaska Admin. Code tit. 11, § 71.130 (1974) (repealed 1982); Alaska Admin. Code tit. 11, §§ 71.230, 71.910(11) (1982); Pet. App. 19a-21a) authorizing the Commissioner to require primary manufacture within the State of timber cut from state-owned lands. In addition to the statute and regulations promulgated thereunder, the State legislature has passed various resolutions calling upon the Commissioner to impose the primary manufacture requirement (J.A. 52a-55a).

² While this was the reason given for imposing primary manufacture as a condition of the Icy Cape No. 2 Sale, Alaska advised the court of

Petitioner, an Alaskan corporation primarily engaged in the business of purchasing Alaskan timber, logging it, and shipping the logs almost exclusively to Japan, brought this action for injunctive relief in the United States District Court for the District of Alaska. Petitioner contended that because it does not own an operating mill in Alaska it would be effectively prevented from bidding on the Icy Cape No. 2 sale by the added expense of contracting with an in-state processor and asserted that the in-state primary manufacture requirement violates the Commerce Clause (U.S. Const. Art. I, § 8, Cl. 3) (J.A. 141a). Respondent Kenai Lumber Co., a competitor of petitioner's that does have an in-state processing mill, intervened in the action as a defendant.

2. The district court granted petitioner's motion for summary judgment and permanently enjoined the State from requiring in-state primary manufacture of state-owned timber (J.A. 127a-137a). The district court first rejected the State's contention that Congress has implicitly consented to Alaska's primary manufacture requirement by authorizing the imposition of export quotas on unprocessed timber cut from *federal* lands (J.A. 129a-131a). Notwithstanding congressional enactments with respect to federal lands (see pages 11-14, *infra*), the court noted that Congress "has in no way expressly exempted state timber laws from commerce clause restrictions" (J.A. 131a) and concluded that, in the face of congressional silence, "a negative is presumed to bar state action inimical to the national commerce" (*ibid.*).

The district court also rejected the State's argument, made in reliance on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), that it was acting in a proprietary capacity as a "market participant," rather than as a "market regulator," when it imposed the in-state processing requirement as a condition on the sale of its timber. The district court concluded that Alaska's primary manufacture requirement

appeals that the State "usually" requires primary manufacture within the State in any event, apparently without regard to the amount of federal timber available for in-state processing. See C.A. Br. 6.

"goes beyond the *Alexandria Scrap* exemption, [because] a natural resource is involved" (J.A. 133a). The court explained its reasoning as follows (*ibid.*, quoting Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 71):

The uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow, prevent a state from economically discriminating in favor of its residents simply because a resource lies on state-owned land.

* * * The *Alexandria Scrap* general rule is not a magic talisman which allows a state to place unconstitutional restrictions on a resource if it is state-owned. While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not "attach conditions to the use or disposition of the resource that might independently burden interstate commerce...."

Finally, the district court concluded that Alaska's primary manufacture requirement constituted an impermissible burden on interstate and foreign commerce under the test established by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (J.A. 133a-135a). The court found that the primary manufacture requirement does not regulate even-handedly, that its purpose of economic protectionism cannot justify the burdens imposed on commerce, that those burdens are substantial, and that the State could employ less burdensome means to achieve the same end (*ibid.*).

3. On the State's appeal, the Ninth Circuit reversed, and, in doing so, professed to avoid the constitutional issues (J.A. 138a-144a). The court of appeals found "implicit approval of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands" (J.A. 139a). Without citation of authority, the court concluded that the express consent of Congress was not a prerequisite for the validation of otherwise impermissible state commercial regulations (J.A., 142a):

The rule acknowledging congressional power to approve otherwise impermissible state regulation of in-

terstate commerce usually is applied in cases where Congress has expressly authorized such regulation, see, e.g., *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981). But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests.

Because the court of appeals found that "Congress has acted to validate the state policy" (J.A. 142a), it declined to pass on either the applicability of the *Alexandria Scrap* exemption or the district court's conclusion that Alaska's primary manufacture requirement constitutes an impermissible burden on commerce.

SUMMARY OF ARGUMENT

A. The court of appeals' "implicit approval" theory, adopted without citation of any authority, conflicts with a long line of decisions of this Court invalidating state restrictions on interstate or foreign commerce because congressional consent had not been "expressly stated." See, e.g., *Sporhase v. Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), slip op. 18; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980). Moreover, the theory is virtually incapable of clear application; ascertaining whether a state enactment "parallels" federal policy is far more difficult than the court of appeals was willing to acknowledge. Any number of federal laws could be interpreted as establishing a "policy" on a particular matter, and the inferences to be drawn from those laws might easily be inconsistent. Thus, the "implicit approval" theory invites judicial speculation about what Congress "probably had in mind." *New England Power Co. v. New Hampshire*, 455 U.S. at 343. In addition, the theory also invites parochial discrimination against unrepresented interests; only a requirement of express congressional authorization ensures that unrepresented interests will have their views considered by the national legislature, entrusted by the Constitu-

tion with the responsibility for considering and reconciling competing policies.

This case clearly demonstrates the unsoundness of the "implicit approval" theory. Although it is true that the federal government has long followed a policy of requiring most timber cut from national forest lands in Alaska to be processed within that State, it has not done so for the protectionist purposes that Alaska seeks to advance. Rather, the federal interest is limited to ensuring adequate wood processing capacity in Alaska to handle *federal* timber; to the extent achievement of that interest also advances local economic interests, it does so only incidentally because Congress has never manifested any independent concern with enhancing local employment opportunities in the Alaska timber processing industry. Thus, Alaska's primary manufacture requirement, instead of "paralleling" federal policy, exceeds that policy in pursuit of a protectionist goal that Congress has not sanctioned.

Moreover, only once has Congress acted to restrict the sale of timber from state-owned lands, and on that occasion it specifically exempted Alaska from the restrictions. See Pub. L. No. 96-126, tit. III, § 308, 93 Stat. 980 (Pet. App. 30a). Thus, it would be more plausible to infer that Congress generally *favors* the unrestricted export of state-owned timber, and *disapproves* of any restrictions on timber exports from State of Alaska lands, than to conclude that Congress has "implicitly approved" the challenged Alaska practice. Nor need this conclusion rest on inference alone; Congress has given extensive consideration to the general subject of log export controls and has repeatedly refused the requests of western states for precisely the type of authority that Alaska is attempting to exercise in this case. Under these circumstances, the "implicit approval" theory cannot be sustained.

B. Alaska's primary manufacture requirement is not exempt from Commerce Clause scrutiny under the "market participant" doctrine. This Court has never applied the doctrine to sanction state hoarding of natural resources, nor has it applied the theory to state actions that have their primary impact on foreign rather than interstate com-

merce. Here, unlike the situation in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the article of commerce that the State is attempting to block—unprocessed timber—is not a manufactured end product, produced by virtue of the State's "foresight, risk, and industry" (*Reeves*, 447 U.S. at 446) (footnote omitted), but is instead a vital natural resource that "by happenstance" is located within the State of Alaska. Moreover, Alaska's primary manufacture requirement takes the State out of the role of a participant in the timber industry and transforms it into a regulator in the timber *processing* industry. Such "downstream" regulation, where the State retains no proprietary interest in the end product (unlike the City of Boston's continuing interest in the city-funded construction projects considered in *White v. Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983)), has never been sanctioned by this Court. Finally, the effect of Alaska's primary manufacture requirement is visited almost exclusively upon foreign commerce because there is no viable domestic market for Alaskan wood products. The "market participant" doctrine, which is based at least in part on notions of federalism and considerations of state sovereignty (*Reeves*, 447 U.S. at 438), should not be extended to situations burdening foreign commerce.

C. In the absence of congressional consent, Alaska's primary manufacture requirement is clearly an impermissible burden on foreign commerce. While the requirement would fail to pass constitutional muster even under the "flexible" test enunciated in *Pike v. Bruce Church, Inc.*, *supra*, that test is inappropriate here both because the challenged state regulation was adopted solely for the purpose of economic protectionism and because the burdens that the State would impose on foreign commerce intrude on Congress's exclusive authority to determine the foreign policy of the United States.

Alaska's primary manufacture requirement is precisely the type of protectionist state regulation that this Court has repeatedly struck down under "a virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The Court has adopted such a rule because

the animating purposes of the Commerce Clause are most threatened by "a law that overtly blocks the flow of interstate commerce at a State's borders." *Ibid.* Alaska's primary manufacture requirement does just that with respect to unprocessed timber, and thus it is subject to the rule of *per se* invalidity.

In addition, this Court's decision in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), establishes that Congress's power over foreign commerce is even greater than it is over interstate commerce. The Nation's need to speak "with one voice" on the subject of export controls cannot be questioned. Moreover, Congress has legislated extensively on the subject of export controls, and it has narrowly limited the circumstances in which it is willing to tolerate their adverse effects. Alaska's ban on the export of unprocessed timber is not among the controls that Congress has sanctioned, and it therefore cannot withstand scrutiny under the foreign Commerce Clause.

ARGUMENT

ALASKA'S PRIMARY MANUFACTURE REQUIREMENT VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

A. Congressional Consent To Otherwise Impermissible State Regulation Of Commerce May Not Be Implied From "Parallel" Federal Policies

1. The court of appeals' holding (J.A. 142a) that express congressional authorization "is not always necessary" to validate otherwise impermissible state regulation of interstate commerce conflicts with a consistent line of decisions of this Court. When Congress has exercised its "undoubted power to redefine the distribution of power over interstate commerce" (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945)), it has always done so expressly. See, e.g., *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 654 (1981) (Congress "explicitly intended" the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, to authorize state taxing and regulatory powers over the insurance business); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946) (state tax on foreign insurance companies upheld in view of "positive expression" in the

McCarran Act); and *Whitfield v. Ohio*, 297 U.S. 431, 438-439 (1936) (Hawes-Cooper Act, 49 U.S.C. 60, expressly removed restrictions on state regulatory power over convict-made goods shipped in original packages in interstate commerce). Most recently, in *White v. Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), the Court upheld a "local hire" executive order issued by the Mayor of Boston, insofar as it was applied to projects supported in part with funds from federal programs, only because it was found to be "affirmatively sanctioned by the pertinent regulations of those programs," and thus exempt from the restraints of the Commerce Clause. *White*, slip op. 11 (emphasis added).

The requirement that Congress expressly consent to otherwise unconstitutional state restraints on interstate or foreign commerce is confirmed by several recent decisions invalidating state laws when congressional authorization was lacking. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court rejected the contention that a Florida law prohibiting out-of-state bank holding companies from acquiring local investment subsidiaries was authorized by Sections 3(d) and 7 of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(d) and 1846, finding "nothing in [the Act's] language or legislative history to support the contention * * *" (447 U.S. at 49). In *Sporhase v. Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), Congress was found not to have consented, in various federal statutes that defer to state water law, to a Nebraska statute restricting the export of groundwater from the state. Significantly for the present case, the Court noted that in each prior instance in which congressional consent was found in a federal statute, it was "expressly stated." *Sporhase*, slip op. 18. Finally, in *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982), the Court declined to read Section 201(b) of the Federal Power Act, 16 U.S.C. 824(b), as giving congressional consent to a New Hampshire statute prohibiting the exportation of hydroelectric energy produced within its borders by a federally-licensed facility:

[W]hen Congress has not "expressly stated its intent and policy" to sustain state legislation from attack un-

der the Commerce Clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress "probably had in mind." See *United States v. Public Utilities Comm'n of California*, 345 U.S., at 319 (Jackson, J., concurring); see also *id.*, at 311.

The unprecedented "implicit approval" theory of the court of appeals directly conflicts with the holding in *New England Power Co.*, set forth above. The theory invites the courts to resort to "mere speculation" about what Congress "probably had in mind" in order to determine whether Congress, in enacting a statute regulating commerce, tacitly authorized states to impose parallel but otherwise impermissible burdens on interstate and foreign commerce. The uncertainties inherent in the application of the "implicit approval" theory are well-illustrated by the case at hand; as we demonstrate in the next section of this brief (see pages 11-14, *infra*), the relevant congressional enactments more readily support the conclusion that Congress would *disapprove* of Alaska's primary manufacture requirement than the contrary conclusion reached by the court of appeals.

What is more, the requirement of express congressional consent to otherwise invalid state laws is not grounded solely on a desire to avoid judicial speculation. It also implements the constitutional allocation of power over the regulation of commerce. From the earliest days of the Republic, this Court saw the danger to the Nation's economy if state legislatures, in which local interests alone are represented, were free to pass statutes that discriminated against interstate commerce. See *M'Culloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Later, the Court extended this reasoning and struck down under the Commerce Clause statutes that discriminated against unrepresented out-of-state interests. See *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 499 (1887); see also *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940). The requirement of explicit congressional approval for discriminatory state statutes is a necessary corollary to the proposition that the Commerce Clause is designed to protect unrepresented interests from

parochial discrimination. See generally J. Ely, *Democracy and Distrust* 83-84 (1980). It assures that the national legislative process will afford the representatives of the burdened interests a clear opportunity to voice their views. Cf. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 Harv. L. Rev. 682, 695 (1976). The "implicit approval" theory, on the other hand, strips away this opportunity from the national representatives of the burdened interests and gives the initiative instead to state legislatures. As the Court recognized in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 543 (1949), "[i]t is, of course, a quite different thing if Congress through its agents finds * * * restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity." The net effect of the "implicit approval" theory is therefore to make it harder to check "the tendencies toward economic Balkanization" (*Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)) that the Commerce Clause was designed to prevent.

2. It is undisputed that Congress has passed no law expressly authorizing Alaska's restrictions on the sale of timber from state-owned land. Nevertheless, the court of appeals held that Congress has given "implicit approval" to Alaska's primary manufacture requirement because the State's policy allegedly parallels federal policy with respect to timber cut from *federal* lands. J.A. 139a. As we have just demonstrated, the "implicit approval" theory is contrary to a consistent line of decisions from this Court. But even if it were not, the inferences to be drawn from the "parallel federal policy" with respect to federal lands are uncertain at best, thus making the "implicit approval" theory particularly inappropriate in this case.

It is true, as the court of appeals recognized (J.A. 142a), that, pursuant to authority granted by Congress in the Organic Administration Act of 1897, 16 U.S.C. 475 and 551 (Pet. App. 22a-23a), the Secretary of Agriculture has since 1928 restricted the export of unprocessed timber cut from

national forest lands in Alaska. 36 C.F.R. 223.10(c).³ But the objective of the federal timber policy for national forest lands, as set forth in the Organic Administration Act of 1897, 16 U.S.C. 475 (Pet. App. 22a), is to secure "favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States." With respect to timber cut from national forest lands in Alaska, the statutory objective of furnishing a continuous supply of timber is further amplified by the implementing regulation; 36 C.F.R. 223.10(c) explains that restrictions on the export of unprocessed timber cut from national forest lands in Alaska are "necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities." Thus, the federal interest, as expressed by statute and regulation, is in ensuring adequate wood processing capacity to handle *federal* timber in order to guarantee sustained utilization of that timber; neither Congress nor the Secretary of Agriculture has manifested any separate concern with enhancing local employment opportunities, and to the extent federal policy has that effect, it is only an incidental by-product of the federal interest in maintaining sufficient processing capacity to handle *federal* timber.

Alaska's primary manufacture requirement, on the other hand, operates not only to ensure a continuous supply of timber but has as an express and independent purpose the protection of in-state manufacturers from out-of-state competition. See, *e.g.*, J.A. 55a. Thus, it may well be that the federal lands restriction contained in 36 C.F.R. 223.10(c) fully satisfies Congress's intent to assure a continuous supply of timber for the United States, while Alaska's requirement continues to operate in pursuit of a protectionist aim that Congress has not endorsed. The possibility that this is so illustrates the difficulty courts would have in ascer-

³ Exportation of privately-owned timber is also restricted to the extent such exports are made possible by the purchase of national forest timber. See 36 C.F.R. 223.10(a)(1) and (4).

taining whether an ostensibly "parallel" state statute is pursuing independent policy goals under the cloak of a federal statute whose policy goals have already been fulfilled.

In addition to the restriction on exportation of unprocessed timber cut from national forest lands in Alaska, the court of appeals relied (J.A. 142a-143a) on another federal statute that imposed a log export quota, in effect between 1969 and 1973, on logs cut from all *federal* lands located west of the 100th meridian (a line running from central North Dakota through central Texas). 16 U.S.C. 617. In 1973, the quota was replaced by a series of annual riders to appropriation acts that prohibit the Secretaries of the Interior and Agriculture from using appropriated funds to export timber from federal lands west of the 100th meridian in the *contiguous* 48 states (*i.e.*, *not* including Alaska). See, *e.g.*, Pub. L. No. 96-126, Tit. III, § 301, 93 Stat. 979 (Pet. App. 29a). See also 36 C.F.R. 223.10(b) (Department of Agriculture regulation implementing export ban). Significantly, the annual appropriation riders and the implementing regulation limit only the *foreign* export of unprocessed timber cut from federal lands; they do not require in-state processing before the timber may be sold in *domestic* interstate commerce. Thus, to the extent that Congress may have expressed a concern for protecting the domestic timber processing industry, it has done so on a national rather than state basis. Under these circumstances, there is no reason to suppose that Congress would give express approval to single-state protectionist legislation; on the contrary, it has actually declined to do so (see page 14 & note 4, *infra*). Again, therefore, the court of appeals presumed too much when it concluded that Alaska's "primary manufacture requirements duplicate those imposed on federal timber and serve the same objective * * *" (J.A. 143a).

Only once has Congress passed a law restricting the sale of timber from *state-owned* lands, and that enactment provides no support for the court of appeals' decision. Under the authority of the Export Administration Act of 1979, 50 U.S.C. (Supp. V) App. 2406(i)(1) (Pet. App. 28a-29a), Congress acted to impose export quotas from 1979 to 1982 on

unprocessed western red cedar logs (a rare species of timber in short supply) and to ban their export thereafter. At the same time, however, Congress specifically exempted from the quotas and ban western red cedar logs cut from *Alaskan* lands. See Pub. L. No. 96-126, tit. III, § 308, 93 Stat. 980 (Pet. App. 30a). Thus, contrary to the assumption drawn by the court of appeals, it would be more plausible to infer that Congress *favours* the unrestricted export of all timbers (except red cedars) from state lands, and *disapproves* any restrictions on timber exports from State of Alaska lands. Certainly, the pertinent federal enactments do not support the court of appeals' conclusion that Alaska's primary manufacture requirement "could not have been more in keeping with federal timber policy" (J.A. 144a).

Finally, the "implicit approval" theory is particularly ill-suited to the particular circumstances of this case because Congress has in fact given the subject of log export controls considerable attention, but has declined to take any action authorizing state regulation of the type enacted by Alaska. In 1981, for example, Congress was informed of the district court's decision in this very case and was asked in response to that decision to "grant[] the States authority to pass laws regarding domestic manufacturing * * *." *Prohibit Export of Unprocessed Timber: Hearing on H.R. 639 Before the Subcomm. on Forests, Family Farms, and Energy of the House Comm. on Agriculture*, 97th Cong., 1st Sess. 18-19 (1981). Notwithstanding strong support from the western states, Congress failed to provide the states with the requested authority.⁴ The court of appeals was thus plainly out of bounds in sanctioning state commercial restrictions that not only have not received Congress's "implicit approval," but have in fact been *expressly rejected* after congressional consideration.

⁴ The unsuccessful 1981 measure is not the only time Congress has considered this subject. As elaborated in petitioner's brief, Congress has debated this issue for more than a decade. Yet, with the exception of the special provision for western red cedar logs previously described, Congress has enacted no general law authorizing export restrictions on timber cut from state-owned lands.

3. The "implicit approval" theory is especially dangerous in this case because it directly implicates the commercial relations of the United States with other nations. In addition to Alaska, three other western states—California, Oregon, and Idaho—restrict the export of unprocessed timber. See Pet. App. 36a-38a. Because most of the timber exported from those states is purchased by Japan,⁵ the primary impact of these state statutes falls on foreign commerce. The result is state interference with foreign commerce, which is, of course, "preeminently a matter of national concern." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1978).

It is evident that the "implicit approval" theory would have a far-reaching effect on the federal government's power over foreign commerce. See pages 24-26, *infra*. Under the theory of implied congressional consent, states would be free to enact non-uniform and otherwise impermissible burdens on foreign commerce without any focused consideration and decision by the national legislature. In our submission, that doctrine carries too great a risk that the foreign relations of the United States will be adversely affected by an unintended reallocation of the commerce power that the Constitution placed in the keeping of Congress. The court of appeals' novel approach to Commerce Clause analysis should be therefore rejected by this Court.

B. Alaska's Primary Manufacture Requirement Does Not Fall Within The Scope Of The "Market Participant" Doctrine

Although the market participant issue was not decided by the court of appeals (J.A. 141a-142a), Alaska apparently intends to argue in this Court that it furnishes an alternative basis for affirmance. See Br. in Opp. 10-14. We sug-

⁵ As noted by petitioner (Pet. 3 n.2), Japan, in 1980, purchased 90% of the \$1.4 billion of unprocessed logs exported from Washington, Oregon, Alaska, and California. F. Ruderman, *Production, Prices, Employment and Trade in Northwest Forest Industries, Second Quarter 1982*, at 19 (U.S. Forest Service 1982). The State of Washington, which does not have an in-state processing statute, received \$1.034 billion of the \$1.4 billion total. Ruderman, *supra*, at 17-19.

gested in our brief at the petition stage (at 5, 11) that the case should be remanded to the court of appeals for resolution of this issue, and the Court may wish to follow that approach. In the event the Court decides to resolve the question itself, however, we set forth our views for the Court's consideration. In our submission, Alaska's primary manufacture requirement cannot escape Commerce Clause scrutiny under the market participant doctrine. The requirement was imposed with a regulatory, protectionist motive (enhancement of local employment), and the Alaska situation fits neither the fact patterns of this Court's previous market participant decisions nor the policies behind the creation of the market participant doctrine.

The Court was asked for the first time in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), "to decide whether state and local governments are restrained by the Commerce Clause when they seek to effect commercial transactions not as 'regulators' but as 'market participants.'" *White*, slip op. 2. *Alexandria Scrap* involved a Maryland statute designed to encourage the recycling of abandoned automobiles by offering a "bounty" for every Maryland-titled automobile converted to scrap. The statute as initially passed did not require scrap processors to present documentation of ownership for automobiles over eight years old ("hulks"); in 1974, however, the statute was amended to require such documentation, and the amendment imposed more exacting documentation requirements on out-of-state scrap processors than on in-state scrap processors. As noted by the Court, the practical effect of the amendment, which made it less remunerative for suppliers of automobiles to transfer their vehicles outside of Maryland, "was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors." *Alexandria Scrap*, 426 U.S. at 803 n.13.

The appellee in *Alexandria Scrap*, a Virginia scrap processor licensed under the Maryland program, contended that the Maryland statute, as amended, "violated the Com-

merce Clause by interfering with, or 'burdening,' the flow of bounty-eligible hulks across state lines * * * (426 U.S. at 802). The Court disagreed, holding that the Maryland statute was not subject to Commerce Clause analysis and noting that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others" (*id.* at 810) (footnote omitted). In support of its conclusion, the Court noted that "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price." *Id.* at 806.

In the next case to apply the market participant theory, *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court upheld the right of the State of South Dakota to restrict the sale of cement produced by a state-owned plant to state residents. The Court rejected the argument that the decision to sell cement to state residents only was "protectionist" and thus *per se* invalid under *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), by noting that the decision was "'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the state was created to serve." *Reeves*, 447 U.S. at 442. The Court also rejected the contention that the *Alexandria Scrap* rule should not be invoked to allow a state to hoard resources by distinguishing cement from natural resources "like coal, timber, wild game, or minerals." 447 U.S. at 443 (emphasis added). After noting that South Dakota neither limited access to the raw materials used to make cement nor barred resale of its cement outside the State, the Court concluded that "[w]hatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there" were not applicable to South Dakota's case. *Id.* at 444. Finally, the Court expressed its reluctance to penalize the "foresight, risk, and industry" demonstrated by South Dakota's entry into the cement-manufacturing business. *Id.* at 446 (footnote omitted); see also *id.* at 444 n.17.

The most recent case to consider the market participant doctrine is *White v. Massachusetts Council of Construction Employers, Inc.*, *supra*. In *White*, the Court considered a Commerce Clause challenge to an executive order issued by the Mayor of Boston requiring all construction projects funded in whole or in part with city funds, or funds that the city had authority to administer, to be performed by a work force consisting of a least half *bona fide* residents of Boston. The Court upheld the executive order, to the extent it applied to projects funded entirely by city funds, under the market participant doctrine. *White*, slip op. 10-11.⁶ The Court concluded that the city is participating in the marketplace when it expends only its own funds in entering into construction contracts for public projects. *Ibid*. Although recognizing that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business" (slip op. 7 n.7), the Court determined that those limits had not been transgressed by the Mayor's executive order because the order "cover[ed] a discrete, identifiable class of economic activity in which the city is a major participant," so that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Ibid*.

In the present case, Alaska argues (Br. in Opp. 11) that its primary manufacture requirement "constitutes direct participation in the market, rather than regulation of private trade in the timber market," relying primarily on *Reeves*, which Alaska asserts is similar to the instant case "in every significant respect" (Br. in Opp. 12). Alaska finds the following similarities between its situation and *Reeves*: (1) both involve a condition placed on the sale of state-owned property; (2) the properties in question both involve investment of state dollars;⁷ (3) the challenged sale restric-

⁶ The Court also upheld the order, to the extent it applied to projects funded in part with federal funds, by finding that the order was "affirmatively sanctioned" by federal regulations. *White*, slip op. 11. See page 9, *supra*.

⁷ Petitioner disputes this assertion, arguing that "there is no evidence in the record to support [Alaska's] contention * * *." Pet. Reply

tions both apply only to the immediate parties with whom the state is transacting business;⁸ and (4) neither involves an attempt to hoard natural resources located within the state. Br. in Opp. 12-13.⁹

In our submission, Alaska fails in its attempt to bring itself within the market participant doctrine. The critical distinction between Alaska's imposition of the primary manufacture requirement and the stricter documentation requirements for out-of-state scrap processors at issue in *Alexandria Scrap* is that, unlike Alaska, Maryland neither prohibited the flow of commerce in "hulks" nor regulated the conditions under which that flow occurred. Whereas the hulks remained in Maryland in response to market forces, including those exerted by Maryland as a purchaser, the timber in this case would remain in Alaska for processing not in response to market forces but solely because Alaska, by requiring primary manufacture as a condition of sale, has prohibited the timber in question from being exported in its unprocessed state.

Although Alaska argues that its situation is the same as the situation in *Reeves*, the facts do not support that contention. The present case would be analogous to *Reeves* only if Alaska, instead of requiring in-state timber processing as a condition of sale, limited the sale of its timber to state residents.¹⁰ In *Reeves*, the Court stressed that a state, like a private business, should be free to choose the

Br. 8 n.10. We, too, find the assertion to be of dubious validity. See page 20 note 11, *infra*.

⁸ Alaska argues that, just as South Dakota residents are free to resell cement to out-of-state purchasers, a purchaser of state-owned timber is free to export and sell the timber once the primary manufacture requirement is satisfied. Br. in Opp. 12-13.

⁹ Alaska's argument that its primary manufacture requirement does not result in the hoarding of resources is based on the fact that it is only one of many owners of commercial timber land in Alaska. Br. in Opp. 13.

¹⁰ Such a restriction, however, would be a clear attempt to hoard natural resources, rather than the products manufactured from such resources. As such, it would likely fall outside the limits of the market participant doctrine as articulated in *Reeves*. *Reeves*, 447 U.S. at 443. See pages 21-22, *infra*.

parties with whom it wishes to deal. *Reeves*, 447 U.S. at 438-439. Alaska, however, by imposing its primary manufacture requirement, is not selecting the parties to whom its wishes to sell its timber, but is instead selecting the timber *processors* with whom its purchasers must deal with respect to the processing of the purchased timber. South Dakota did not bar the resale of the item sold (cement) outside the state, whereas Alaska does prohibit the resale of unprocessed timber outside Alaska. Alaska's in-state processing requirement thus goes beyond the selection of bargaining partners, which was at the heart of *Alexandria Scrap* and *Reeves*, and constitutes "a direct attempt to govern private economic relationships." *White*, slip op. 4 (Blackmun, J., concurring in part and dissenting in part).¹¹

In Alaska's behalf, it might be said that this case more closely resembles the governmental action upheld in *White*, which was decided after the district court's decision in this case. Alaska conditions the sale of its timber on the requirement that it be processed in Alaska; in *White*, Boston conditioned its contracts for city-funded construction projects on the requirement that work under the contracts be performed by a work force composed of at least half city residents. While both situations thus appear to involve the imposition of restrictions that impact beyond the contracting parties, the Court in *White* still treated the city's executive order as being within the city's right to select its bargaining partners. See *White*, slip op. 7 n.7.

Notwithstanding this similarity, however, the Alaska timber processors cannot be characterized, even in an informal sense, as "working" for the State, and the primary manufacture requirement cannot be justified as part of the State's right to select the partners with whom it will deal. Although Alaska may be a *participant* in the timber market, and therefore perhaps entitled to some leeway in the

¹¹ As noted by petitioner (see pages 18-19 note 7, *supra*), Alaska's situation is also distinguishable from *Reeves* on the ground that Alaska has not expended any "foresight, risk, and industry" (*Reeves*, 447 U.S. at 448) (footnote omitted) to bring about the happenstance of inheriting commercial timber lands from the federal government.

selection of those to whom it chooses to sell timber (but see *Hicklin v. Orbeck*, 437 U.S. 518, 532-533 (1978), and cases cited therein), the imposition of the primary manufacture requirement transforms the State into a *regulator* in the timber *processing* market. The in-state processing requirement clearly constitutes "downstream" regulation, i.e., an attempt to impose restrictions beyond the initial disposition of the timber. See Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 92-93 (1980). The conclusion that Alaska is engaging in impermissible downstream regulation is strengthened by the fact that it retains no proprietary interest in the end product—processed timber.¹² Boston, on the other hand, was the "buyer" of the construction projects it financed, and thus it had a continuing proprietary interest in the administration of the funds it was expending, even if that interest affected the relationship between its contractors and their work forces. Accordingly, Alaska's primary manufacture requirement exceeds anything this Court has sanctioned in its previous market participant decisions.

Moreover, paramount national interests counsel against extending the market participant doctrine to Alaska's primary manufacture requirement. First, the Court has never employed the doctrine to sanction state regulation of natural resources. As noted by the district court (J.A. 133a), "[t]he uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow," remove this case from the general rule of *Alexandria Scrap*. Cf. *Hicklin v. Orbeck*, 437 U.S. at 532-533.

In addition, none of this Court's previous market participant decisions has involved foreign commerce. It is not at all clear that the market participant doctrine should ever

¹² See *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13 (1928) (requirement for in-state processing of shrimp struck down because "by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control").

extend to such situations (cf. *Reeves*, 447 U.S. at 438 n.9), in part because it rests on "considerations of state sovereignty" (*id.* at 438) (footnote omitted) that carry great force in the domestic context but must give way in the face of state attempts to burden foreign commerce. As the Court explained in *Japan Line*, 441 U.S. at 449 n.13:

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism or state sovereignty. It has never been suggested that Congress' power to regulate foreign commerce could ever be so limited.

In short, this case, involving state regulation of a vital natural resource having a substantial effect on foreign commerce, requires the Court to establish some of the "limiting principles" of the market participant doctrine, the absence of which so troubled the dissenting Members of the Court in *Reeves* (see *Reeves*, 447 U.S. at 453 (Powell, J., dissenting)).

C. Alaska's Primary Manufacture Requirement Impermissibly Burdens Foreign Commerce

Again, because it found "implicit" congressional approval, the court of appeals did not determine whether Alaska's primary manufacture requirement impermissibly burdens foreign commerce. Accordingly, we set forth our views on the question for the Court's consideration in the event that a remand is deemed unnecessary.

The district court analyzed this issue under the test established in *Pike v. Bruce Church, Inc.*, *supra* (J.A. 133a-135a). Even applying that "flexible approach" (*City of Philadelphia v. New Jersey*, 437 U.S. at 624), the district court held that Alaska's primary manufacture requirement exceeds permissible Commerce Clause limits, and we agree. In our view, however, two independent factors make *Pike's* general balancing test inappropriate here. First, the purpose of the challenged state regulation calls for especially strict scrutiny. Equally important, the burdens of Alaska's primary manufacture requirement have their impact almost entirely on foreign rather than interstate com-

merce. This factor likewise compels more rigid constitutional scrutiny. And in combination, the two factors mandate the conclusion that Alaska's regulation cannot stand.

1. Alaska's primary manufacture requirement is precisely the type of protectionist state regulation that this Court has repeatedly struck down under "a virtually *per se* rule of invalidity" (*City of Philadelphia v. New Jersey*, 437 U.S. at 624). See, e.g., *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (state may not prohibit facilities to acquire and ship milk in interstate commerce in order to protect and advance local economic interests); *Toomer v. Witsell*, 334 U.S. 385 (1948) (state may not require shrimp fishermen to unload, pack, and stamp their catch at an in-state port prior to shipping it in interstate commerce). As the Court explained in *Pike v. Bruce Church, Inc.*, 397 U.S. at 145:

[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.^[13]

¹³ There is no question that Alaska's primary manufacture requirement results in requiring in-state performance of business operations that could more efficiently be performed elsewhere. Alaska forthrightly admitted in the court of appeals that it suffers a financial loss by insisting on primary manufacture within the State (C.A. Br. 33-34):

When the State of Alaska decides to sell state-owned timber subject to a primary manufacture requirement, the state decides to forego increased stumpage rates for its timber in return for benefits to the State's wood-processing industry.

Similarly, respondent Kenai Lumber Co. explained that (C.A. Br. 6):

When the State sells its timber subject to primary manufacture, the timber is worth less to the state's purchaser than it would be if sold without primary manufacture. The State foregoes the difference in revenue in order to aid the Alaska wood processing industry and its employees.

The Court's hostility to protectionist state legislation finds its roots in the fundamental purpose of the Commerce Clause, reaffirmed only recently in *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979):

The few simple words of the Commerce Clause * * * reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

The "clearest example" of invalid protectionism is "a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 437 U.S. at 624. Alaska's primary manufacture requirement, by blocking the flow of unprocessed logs at the State's borders, is just such an invalid law. It is no answer to say, as Alaska does (Br. in Opp. 12-13), that the flow of commerce in *processed* timber is unrestrained; the fact remains that there is a substantial foreign market for *unprocessed* logs that Alaska blocks solely to protect its domestic timber processors. Such a restriction is subject to this Court's rule of "virtual *per se* invalidity," and should be struck down on that basis alone.

2. Nearly all of Alaska's timber is exported to Japan because distance and shipping costs under the Jones Act, 46 U.S.C. (Supp. V) 883, preclude a viable interstate market for Alaskan timber products. Thus, not only does this case involve the sort of economic protectionism that is virtually *per se* invalid, but the principal effect of Alaska's primary manufacture requirement is visited upon foreign commerce.

In *Japan Line*, 441 U.S. at 448, the Court unequivocally established that Congress's power over foreign commerce is even greater than it is over interstate commerce. The Court went on to explain (*id.* at 448-449) (footnote omitted) that:

Foreign commerce is preeminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United

States act through a single government with unified and adequate national power." *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933). * * * [I]n discussing the Import-Export Clause, this Court, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

It is not open to serious debate that the entire subject of export controls is one that must be left to the national government. Congress has legislated extensively in the field, leaving no room for states to interpose their own notions of proper policy. In the Export Administration Act of 1979, 50 U.S.C. (Supp. V) App. 2402(1), Congress established a national policy of "minimiz[ing] uncertainties in export control policy and * * * encourag[ing] trade with all countries with which the United States has diplomatic or trading relations * * *." To achieve this policy, Congress has narrowly and precisely identified the situations in which it is willing to tolerate the adverse effects of export controls. Export controls are thus generally limited to those situations necessary to maintain national security, significantly further the foreign policy of the United States, or preserve scarce materials for domestic use. 50 U.S.C. (Supp. V) App. 2402(2).¹⁴ Accordingly, any restriction on log exports is

¹⁴ As previously noted, Congress has exercised its export control authority to preserve scarce western red cedar logs (except those from Alaska) for domestic consumption. See pages 13-14, *supra*. Any additional controls imposed by a state would obviously conflict with the congressional determination not to sanction general export controls on timber.

See also *Log-Exporting Problems: Hearings Before the Subcomm. on Retailing, Distribution, and Marketing Practices of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess., Pt. 3, 1383 (1968):

Proposals to curtail log exports encounter an objection that the United States is committed to encouragement of international trade and general reductions of trade barriers. Under the Trade

clearly a matter within the exclusive province of the national government. Regardless of its motivations, Alaska's attempt to intrude on this sensitive area of foreign relations cannot be tolerated in our federal system.

CONCLUSION

The judgment of the court of appeals should be reversed, or, in the alternative, the judgment should be vacated and the case remanded for further proceedings to resolve the Commerce Clause issues that were not addressed by the court of appeals.

Respectfully submitted.

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NOVEMBER 1983

Agreements Program started in 1934, the United States has aggressively moved to lower tariffs and to foster trade throughout the world. The General Agreement on Tariff and Trade (GATT) signed by the United States and some 60 other countries is dedicated to reduction of tariffs and other trade barriers. To curtail log exports would conflict with this basic policy.

No. 82-1608-CFX
Status: GRANTED

Title: South-Central Timber Development, Inc., Petitioner
v.
Esther Wunnicke, Commissioner, Department of Natural
Resources of Alaska, et al.

Docketed:
March 30, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: DeVeaux, LeRoy Eugene

Counsel for respondent: Higgins, Shelley J., Helm, Richard A.,
Gorsuch, Norman C.

Entry	Date	Note	Proceedings and Orders
1	Feb 16 1983		Application for extension of time to file petition and order granting same until March 30, 1983 (Rehnquist, February 17, 1983).
2	Mar 30 1983	G	Petition for writ of certiorari filed.
4	Apr 25 1983		Order extending time to file response to petition until May 20, 1983.
5	Apr 26 1983	G	Motion of Pacific Rim Trade Association, et al. for leave to file a brief as amici curiae filed.
7	May 23 1983		Brief of respondents Robert LeResche , etc., et al. in opposition filed. <i>ESTHER WUNNICKE</i>
8	May 25 1983		DISTRIBUTED. June 9, 1983
9	Jun 3 1983	X	Reply brief of petitioner South-Central Timber Develop. filed.
11	Jun 13 1983	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
12	Sep 7 1983		Brief amicus curiae of United States filed.
13	Sep 14 1983		REDISTRIBUTED. October 7, 1983
14	Sep 24 1983	X	Supplemental brief of respondent Robert LeResche, etc. filed.
15	Oct 11 1983		Motion of Pacific Rim Trade Association, et al. for leave to file a brief as amici curiae GRANTED.
16	Oct 11 1983		Petition GRANTED. *****
17	Nov 25 1983		Brief amicus curiae of United States filed.
18	Nov 25 1983		Joint appendix filed.
19	Nov 25 1983		Brief of petitioner South-Central Timber Develop. filed.
20	Dec 2 1983		Record filed.
21	Dec 2 1983		Certified original record & C.A. proceedings, 4 volumes received.
22	Nov 25 1983	G	Motion of Pacific Rim Trade Association, et al. for leave to file a brief as amici curiae filed.
23	Dec 6 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Dec 28 1983		Brief amicus curiae of Northwest Independent Forest Manufacturers, et al. filed.
25	Dec 29 1983		Brief of respondents Robert LeResche, etc., et al. filed.
26	Jan 9 1984		Motion of Pacific Rim Trade Association, et al. for leave to file a brief as amici curiae GRANTED.
27	Jan 9 1984		Motion of the Solicitor General for leave to participate

Entry	Date	Note	Proceedings and Orders

28	Jan 9 1984	in oral GRANTED.	
		SET FOR ARGUMENT. Wednesday, February 29, 1984. (3rd case)	
29	Jan 18 1984	CIRCULATED.	
30	Feb 10 1984	X Reply brief of petitioner South-Central Timber Develop. filed.	
31	Feb 29 1984	ARGUED.	